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No. 7657

Vol 1862

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HARRY W. BERDIE, LOS ANGELES MILK INDUSTRY BOARD, MILK PRODUCERS, INC., RICHARD CRONSHEY, WILLIAM CORBETT, DAVID P. HOWELLS, GEORGE A. CAMERON, F. A. LUCAS, EARL MAHARG, A. G. MARCUS, M. H. ADAMSON, T. E. DAY, W. H. STABLER, MAX BUECHERT, C. W. HIBBERT, W. J. KUHRT; GEORGE E. PLATT, A. M. McOMIE, T. H. BRICE, T. M. ERWIN, A. R. READ, E. C. PERKINS, ROSS WEAVER,

Appellants,

vs.

CHARLES J. KURTZ, WESTERN HOLSTEIN FARMS, INC., VALLEY DAIRY, INC., and the LUCERNE CREAM AND BUTTER COMPANY,

Appellees.

Appeal From the District Court of the United States, Southern District of California, Central Division

TRANSCRIPT OF RECORD

Independent-Review, Law Printers, 222 So. Spring St., Los Angeles. TU 1311

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(Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.)

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Citation

United States of America—ss.

To Charles J. Kurtz, Western Holstein Farms, Inc., Valley Dairy, Inc., and the Lucerne Cream and Butter Company; and Lewis D. Collings, Edward M. Selby, and H. C. Johnston, their attorneys, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 16th day of November, A.D. 1934, pursuant to Order Allowing Appeal in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action wherein Harry W. Berdie, Los Angeles Milk Industry Board, Milk Producers, Inc., Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins, Ross Weaver, are appellants, and you are appellees to show cause, if any there be, why the order and decree of preliminary injunction granted against the said appellants in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Geo. Cosgrave, United States District Judge for the Southern District of California, this 18th day of October, A.D. 1934, and of the Inde-

pendence of the United States, the one hundred and fifty-ninth.

GEO. COSGRAVE,
U. S. District Judge for the Southern District of California.

CT:MC

SERVICE of Citation, together with copy of Petition for Appeal, Assignments of Error and Order Allowing Appeal, is acknowledged this 22 day of October, 1934.

LEWIS D. COLLINGS,
EDWARD M. SELBY,
Attorneys for plaintiffs and Appellees.

Received copy of the within this Oct. 22, 1934. H. C. Johnston, Walter F. Haas, RB.

[Endorsed]: In The United States Circuit Court of Appeals for the Ninth Circuit. Harry W. Berdie, et al., Appellants, v. Charles J. Kurtz, et al., Appellees. Citation. Filed Oct 22, 1934 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

CHARLES J. KURTZ, doing business as GOLDEN WEST CREAMERY COMPANY; WESTERN HOLSTEIN FARMS, INC., a corporation; VALLEY DAIRY CO., INC., a corporation; THE LUCERNE CREAM AND BUTTER COMPANY, a corporation,

Plaintiffs,

vs.

HARRY W. BERDIE, LOS ANGELES MILK INDUSTRY BOARD, MILK PRODUCERS, INC., a California Corporation, RICHARD CRONSHEY, WILLIAM CORBETT, DAVID P. HOWELLS, GEORGE A. CAMERON, F. A. LUCAS, EARL MAHARG, A. G. MARCUS, M. H. ADAMSON, T. E. DAY, W. H. STABLER, MAX BUECHERT, C. W HIBBERT, W. J. KUHRT, GEORGE E. PLATT, A. M. McOMIE, T. H. BRICE, T. M. ERWIN, A. R. READ, R. C. PERKINS, ROSS WEAVER, JOHN ONE, JOHN TWO, JOHN THREE, JOHN FOUR, JOHN FIVE, JOHN SIX, JOHN SEVEN, JOHN EIGHT, JOHN NINE, JOHN JOHN TEN, JOHN ONE COMPANY, a Co.-Partnership; JOHN TWO COMPANY, a Co-Partnership; JOHN THREE COMPANY, a Co-Partnership; JOHN ONE COMPANY, a Corporation; JOHN TWO COMPANY, a Corporation; JOHN THREE COMPANY, a Corporation;

Defendants.

In Equity No. 144-C

BILL FOR INJUNCTION

To the Honorable, the Judges of the Above Entitled Court:

The above named plaintiffs, bring this their Bill of Complaint against the above named defendants, and in so doing, allege and represent to the above entitled Court and the Judges thereof, as follows, to-wit:

I.

Each of the above named plaintiff corporations is a corporation duly organized and existing under and by virtue of the laws of the State of California, and doing business exclusively in said State.

The plaintiff, Charles J. Kurtz, is doing business under the fictitious firm name and style of Golden West Creamery Company, and has complied with the statutes in such case made and provided.

II.

The defendant Los Angeles Milk Industry Board claims that it is a board selected as provided in that certain document entitled, "License for Milk, Los Angeles Milk Shed," issued by the Secretary of Agriculture of the United States on November 16, 1933, and by its terms declared to be effective on November 20, 1933, and particularly in Exhibit "D" attached to said document, all of which is hereinafter more particularly set forth; the defendants Richard H. Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, and Earl Maharg, claim that they are the six individual members of said Los Angeles Milk Industry Board selected in accordance with the provisions of sub-

division (a) of paragraph 1 of Exhibit "D," attached to said "License for Milk, Los Angeles Milk Shed"; the defendants A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, and C. W. Hibbert, claim that they are the six members of said board selected in accordance with the provisions of subdivision "b" of paragraph 1 of said Exhibit "D"; the defendant W. J. Kuhrt claims that he is the thirteenth member of said board and the Chairman thereof selected in accordance with the provisions of subdivision (c) of paragraph 1 of said Exhibit "D"; the defendants George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins, and Ross Weaver claim that they are alternate members of said Los Angeles Milk Industry Board; the individual defendants mentioned in this paragraph are now, and at all times since on or about the 18th day of November, 1933, have been acting as members of said Los Angeles Milk Industry Board, and each of said defendants is now, and at all times since on or about the 18th day of November, 1933, has been acting as a member of said board; upon information and belief plaintiffs allege that said George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins and Ross Weaver have not been selected as members of said board nor has either or any of them ever been selected as a member of said board in accordance with or pursuant to any of the provisions of said "License for Milk, Los Angeles Milk Shed"; upon information and belief plaintiffs allege that said F. A. Lucas never was selected as a member of said Los Angeles Milk Industry Board in accordance with or pursuant to the provisions of subdivision (a) of paragraph 1

of said Exhibit "D"; upon information and belief plaintiffs allege that said Max Buechert never was selected as a member of said Los Angeles Milk Industry Board in accordance with or pursuant to the provisions of subdivision (b) of paragraph 1 of said Exhibit "D"; upon information and belief plaintiffs allege that said W. J. Kuhrt never was selected as a member or as the thirteenth member of said Los Angeles Milk Industry Board in accordance with or pursuant to the provisions of subdivision "c" of paragraph 1 of said Exhibit "D."

III.

The defendant Milk Producers, Inc., is a private corporation organized and existing under and by virtue of the laws of the State of California, and is asserting rights and making demands and exercising purported powers in connection with said alleged license, all of which is hereinafter more particularly set forth.

IV.

That the defendant, Harry W. Berdie, as plaintiffs are informed and believe, and upon such information and belief allege, is Regional representative of the licensing and enforcement section of the Agricultural Adjustment Administration of the United States Department of Agriculture; and in like manner, plaintiffs herein allege that said Harry W. Berdie assumes and claims the right and power of enforcement of the provisions of the license agreement and marketing agreement hereinafter specified and described and referred to herein.

V.

That the defendants John One to John Ten, inclusive, John One Company to John Three Company, a Co-Part-

nership, inclusive, and John One Company, a Corporation to John Three Company, a Corporation, inclusive, are sued herein under fictitious names, their true names being unknown to plaintiffs at this time, and leave of Court will be asked to substitute their true names when and if the same are ascertained.

Each and all of the defendants herein are residents of the above named Federal District, to-wit, the Southern District of California.

VI.

Plaintiffs further allege and show that the matters in controversy in this suit and the questions involved therein are questions arising under the Constitution and the laws of the United States and that, as to each of the plaintiffs herein, the matter in controversy exceeds the sum or value of $3000.00 exclusive of interest and cost; that the subject matter sought to be protected by this suit, to-wit, the business of each of said plaintiffs, and the right of each of said plaintiffs to continue the conduct and operation of the same without interference on the part of the defendants, all as hereinafter set forth, is severally of a value greatly in excess of $3000.00.

VII.

Plaintiffs further show and allege that, while each of them is engaged in separate business, and does not conduct or operate his business jointly or in common with the others, yet each of them is interested in the subject matter of this action. That the said purported license and the said demands made, and to be made, thereunder, upon each of the plaintiffs by the defendants, and the threatened enforcement of said demands and of said

license by the defendants, have a common and similar effect upon each of these plaintiffs and their several businesses. That the questions in controversy submitted by these plaintiffs are questions of common and general interest to the class of persons constituting all producers and distributors of fluid milk within said territory designated by said purported license as the Los Angeles sales area, that the members of said class are so numerous as to make it impracticable to bring them all before the above entitled court, and for said reason plaintiffs sue for themselves and for all the members of said class, pursuant to Equity Rule 38.

VIII.

On or about May 12, 1933, there was enacted by the Congress of the United States a statute designated as an act of May 12, 1933, Chapter 25, 48 Statutes, 73 Congress H. R. 3635, being an act known as the National Agricultural Adjustment Act, and entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes." So far as it may be valid and not in violation of the Constitution of the United States, said law is now in force and effect, but these plaintiffs contend that said law is in conflict with the Constitution of the United States, and therefore invalid to the extent, and in the respects, and upon the grounds, hereinafter more particularly set forth.

IX.

It is provided by Section 8 of the Act of Congress just above mentioned that:

"In order to effectuate the declared policy the Secretary of Agriculture shall have power—

"(3) to issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof. Such licenses shall be subject to such terms and conditions not in conflict with existing acts of Congress or regulations pursuant thereto as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products thereof and the financing thereof * * *."

X.

On July 22, 1933, the Secretary of Agriculture of the United States, with the approval of the President of the United States, did make, prescribe and publish milk regulations, series 1, as follows:

"ARTICLE I.—DEFINITIONS

SECTION 100. As used in these regulations:

(a) The term "act" means the Agricultural Adjustment Act, approved May 12, 1933, as amended.

(b) The term "person" means individual, partnership, corporation, or association.

(c) The term "Secretary" means the Secretary of Agriculture of the United States.

(d) The term "fluid milk" means milk or any product thereof covered by the definition of fluid milk in the marketing agreement in support of which the license is issued.

(e) The term "distributor" means any person engaged in the business of handling, in the current of interstate or foreign commerce, fluid milk for consumption within the distributive area defined in such agreement.

"ARTICLE II.—LICENSES

SECTION 200. Determination of necessity for licenses. —Prior to entering into any marketing agreement under the act with respect to the handling of milk the Secretary shall determine whether it is necessary to issue a license in support of such agreement in order to eliminate unfair practices or charges that prevent or tend to prevent (1) the effectuation of the declared policy of the act with respect to milk and/or its products, and (2) the restoration of normal economic conditions in the marketing of milk and/or its products and the financing thereof.

SEC. 201. Issuance of license.—If the Secretary so determines that a license is necessary with respect to any such marketing agreement, he shall, upon entering into such agreement, issue a license covering such classes of distributors as he shall provide in the license. While the license is in effect it shall cover every such distributor, irrespective of whether he is a party to the marketing agreement and irrespective of whether he is a distributor at the time the license becomes effective. All milk marketing agreements entered into by the Secre-

tary shall contain a provision whereby the distributors parties thereto shall apply for and consent to licensing under the act. The license shall authorize the distributors covered by it to engage in such business, subject to the terms and conditions of the license. The license shall be effective commencing on such date as the marketing agreement becomes effective, unless the license provides in its terms for a different effective date.

SEC. 202. Notice of licensing.—Public notice of any license issued pursuant to these regulations shall be given, at least 3 days prior to the effective date thereof, by posting a copy of the license in a conspicuous place in the main building of the Department of Agriculture, in Washington, D. C., by issuing press releases containing copies of the license, and by making available in the office of the Secretary copies of such press releases. The license when issued shall be filed in the Department of Agriculture and shall be a public record.

SEC. 203 Suspension and revocation.—Any license issued hereunder may be suspended or revoked with respect to any distributor for violation of the terms or conditions thereof by such distributor or by any of his officers, employees, or agents. The procedure for suspension or revocation proceedings shall be in accordance with General Regulations, Agricultural Adjustment Administration, Series 3.

"ARTICLE III.—CERTIFICATES

SEC. 300. Any distributor licensed pursuant to these regulations may, upon application in accordance with a form prescribed by the Secretary and upon payment of

a fee of $2, obtain a certificate evidencing the fact that the holder thereof is a licensee under these regulations; but the obtaining of such certificate shall not be necessary to constitute a distributor a licensee. The certificate shall be nontransferable, shall be in effect only so long as the license has not been suspended or revoked with respect to such distributor, and shall be surrendered for cancellation upon the suspension or revocation of the license with respect to such distributor."

On November 16, 1933, the Secretary of Agriculture of the United States issued the document hereinabove mentioned, entitled "License for Milk, Los Angeles Milk Shed" and purported to make it effective as of the date of November 20, 1933, and purported to take such action under and by virtue of the provisions of said National Agricultural Adjustment Act. A true copy of said document is hereto attached, marked Plaintiffs' Exhibit "A" and hereby made part hereof as fully as if set forth herein verbatim.

(A) As part of the preamble to said purported license, Exhibit "A." the Secretary of Agriculture recites as follows:

"WHEREAS, The Secretary finds that the marketing of milk for distribution as fluid milk in the Los Angeles Sales Area and the distribution of said fluid milk are both in the current of interstate commerce and intrastate commerce, which are inextricably intermingled"; (Sec. II, p. 6.)

(B) Said purported license, Exhibit "A" then provides as follows:

"Now, Therefore, the Secretary of Agriculture acting under the authority vested in him as aforesaid,

"Hereby licenses each and every distributor of fluid milk for consumption in the Los Angeles Sales Area to engage in the handling in the current of interstate or foreign commerce of said fluid milk subject to the following terms and conditions": (Sec. III, p. 6.)

XI.

Said purported license defines Los Angeles sales area as meaning and including the City of Los Angeles, California, and additional territory within the county of Los Angeles and the following adjoining counties, to-wit, the county of Orange, and the westerly portions of San Bernardino and Riverside counties, all entirely within the State of California. (Sec. I, pp. 2 and 3.)

XII.

Said purported license, Exhibit "A," provides:

"Every distributor shall file, prior to the fifth (5th) day of each month with the Chairman of the Los Angeles Milk Industry Board a statement of (a) the quantity of milk purchased from each producer and (b) as to the production of such distributor a statement of the quantities produced and sold as fluid milk." (Sec. III, 4(a) p. 7.)

XIII.

Said purported license, Exhibit "A," further provides that distributors shall not purchase milk from any producer for distribution as Grade A market milk unless such producer authorizes the purchasing distributor to pay over to the Los Angeles Milk Industry Board such

amount as may be determined by said Board provided, however, that such amount shall not exceed one-fourth cent for each pound of butterfat contained in the milk purchased by such distributor. It further provides that distributors having a production of their own shall deduct a like amount for each pound of butterfat contained in milk produced and sold by them and pay the same to said Los Angeles Milk Industry Board and that all distributors, whether they have productions of their own or not shall pay to said Board as distributors an amount equal to that paid by or deducted by them as aforesaid. (Sec. III, 4(b) pp. 7 and 8.)

Said purported license further provides that said Board shall use said funds for the purpose of compiling statistics, making surveys of costs and methods of production and distribution in the Los Angeles market, formulating a program for improving the quality of milk and the standards of the industry generally in the Los Angeles market, arbitrating disputes and engaging in advertising and sales promotion work which will further the interests of the industry. (Sec. III, 4(b) pp. 7 and 8, and Exhibit "D" attached to said Exhibit "A," pp. 59 and 60.)

XIV.

Said purported license, Exhibit "A," further provides that distributors shall not purchase milk for distribution as Grade A market milk from producers not members of some one of seven local associations or organizations of milk producers named therein, unless such producers authorize the purchasing distributor to pay over to the Los Angeles Milk Industry Board an amount for each

pound of butterfat contained in milk purchased from each of said producers equal to the average amount which the members of such association are then authorizing their distributors to pay over to such associations on behalf of their respective members. Provided, however, that such deductions shall in no event exceed one cent per pound of butterfat. Said purported license also provides that similar payments are to be made by distributors having production of their own, and that the sum so paid shall be kept as a separate fund by said Board for the purpose of securing to said producers not members of the said producers associations, advertising, educational, credit and other benefits similar to those secured by the members of said associations by virtue of their payments to said associations. (Sec. III, 4(c) pp. 8. 9 and 10.)

XV.

Said purported license also provides that distributors shall not purchase milk for distribution as Grade A market milk from any producer who is not a member of some one of said seven private, local organizations or associations of milk producers mentioned in said license, unless such producer authorizes the distributor to deduct or cause to be deducted by the particular association of producers of which any such producer is a member, certain amounts specified therein and to be determined by that certain method provided therein, and that said amounts shall be paid to Producers Arbitration Committee, Inc., a private corporation, of which defendant Milk Producers, Inc., a private California corporation is the successor, and that said amounts shall be used by

said defendant for the purpose of equitably allocating the loss involved in handling surplus milk. (Sec. III, 5(a) and (b), pp. 10, 11 and 12.)

That said Milk Producers, Inc., a corporation, owns and operates a surplus plant in the Los Angeles Milk Shed, which said surplus plant is for the purpose of handling all milk from producers in said Los Angeles Milk Shed, having an established base therein fixed in accordance with the provisions of the aforesaid purported License, more particularly Exhibit "C," page 50 of said License, and in accordance with the aforesaid marketing agreement for milk in said Los Angeles Milk Shed, and more particularly Exhibit "C," at page 53 thereof, in excess of the requirements of the distributors in the Los Angeles Sales Area for distribution as fluid milk in said area according to the provisions of said License, and in excess of the requirements of the distributors in the Los Angeles Sales Area, parties to said marketing agreement, for distribution as fluid milk in said area.

That none of the plaintiffs herein are stockholders in or directors of, or have any interest in said Milk Producers, Inc., or its predecessor in interest, Producers Arbitration Committee, Inc., from whom said Milk Producers, Inc., acquired said surplus plant. That each and all of said plaintiffs have in the past handled and disposed of and now handle and dispose of all of their surplus milk, both as distributors and producers, and have handled and disposed of and do now handle and dispose of all of the surplus milk of their producers, and each of them, and that none of said plaintiffs, either

as distributors or producers, or of the producers of said plaintiffs, have delivered or now deliver any milk to said surplus plant, to said Producers Arbitration Committee, Inc., or its successors, Milk Producers, Inc., save and except that since the effective date of said License, plaintiff, Lucerne Cream and Butter Co., has delivered some milk to said surplus plant.

That according to the provisions of said purported License and said marketing agreement, and prior to the said marketing agreement having been approved by the Secretary of Agriculture, and said purported License having been issued by said Secretary of Agriculture, one of the purposes of said surplus plant was for the disposal to distributors of the Los Angeles Sales Area of milk delivered to it in the event of a shortage of milk on the part of said distributors. That prior to the issuance of said marketing agreement and said purported License, one of the plaintiffs herein, to-wit, Valley Dairy Company, Inc., was, on at least two occasions, short of milk for distribution to its customers in the Los Angeles Sales Area and requested of said Producers Arbitration Committee, Inc., then operating said surplus plant, predecessor in interest of said defendant, Milk Producers, Inc., to sell to said Valley Dairy Company, Inc., milk from said surplus plant at the then established price to fill said shortage of milk and enable said Valley Dairy Company, Inc., to distribute to its regular customers in said Los Angeles Sales Area, and said Producers Arbitration Committee, Inc., operating said plant as aforesaid, refused to sell and deliver any milk to said Valley Dairy Company, Inc., although said Producers Arbitration Committee, Inc., and said surplus

plant, had on hand in said surplus plant milk for distribution and sale.

Said purported License also provides that every distributor having a production of his own milk for distribution as Grade A market milk shall pay certain sums each month, to be determined by the method provided therein to Producers Arbitration Committee, Inc., of which defendant Milk Producers, Inc., is the successor, to be used by said defendant for the purpose of equitably allocating the loss of surplus milk. (Sec. III, 5 (c), p. 12.)

XVI.

Said purported License also provides that distributors shall purchase all of their milk requirements of Grade A market milk and Grade A milk for standardization purposes from producers having established bases in the Los Angeles Milk Shed, provided such milk meets all of the health requirements established by the state, county and city health ordinances and regulations within the territory involved. (See Subd. 14, pp. 15 and 16.)

Said purported License and said marketing agreement also provides (License, Exhibit "C," p. 50, et seq., Agreement, Exhibit "C," p. 53, et seq.,) for the establishment of the control of production, and the fixing of a base of each producer marketing milk in the Los Angeles Sales Area on the date of said purported License and said agreement, and establishes the said base by computations covering the period from March 16th, 1933, to June 15th, 1933, inclusive, and does not take into consideration or give any credit in establishing such base of said producers for any production subsequent to June 15th, 1933, and prior to November 20th, 1933, the date

upon which said License became effective, thus making the operation and provisions of the said License retroactive. That by so establishing said base as of November 15th, 1933, the same deprives the producers producing larger quantities of milk after June 15th, 1933, from obtaining the established base price for said milk, and said purported License and said marketing agreement provide for the payment to the producers for such production sold to distributors at a price insufficient to enable said producers to produce and sell said milk except at a loss. That the operation of said terms of said purported License and marketing agreement would put said producers out of business and cause such producers, many of whom furnish milk to the plaintiffs herein, financial losses in excess of $3000.00, and would amount to a confiscation of the property of said producers without due process of law. That at least two of the plaintiffs herein are producers as well as distributors, and as such producing distributors have production of milk in excess of their base as purported to be established under the aforesaid terms and provisions of said purported License and marketing agreement, and have been ordered by said defendant Los Angeles Milk Industry Board to pay to defendant Milk Producers, Inc., the difference between the base price and the surplus price for said production as said terms "base price" and "surplus price" are defined in said purported License.

XVII.

Said purported License, Exhibit A, also fixes the price which must be paid by distributors to producers for Grade A market milk and for all products and com-

modities falling within the definition of fluid milk as defined therein. (See p. 6 and Exhibit A, attached to said document, pp. 17 to 24.)

XVIII.

Said purported License, Exhibit A, also fixes the prices which shall be paid by distributors to producers for fluid milk, and which may be charged by distributors for said products above mentioned upon sale of the same to consumers and to peddlers for resale. (See p. 6, and Exhibit B, attached to said document, pp. 24a to 52.)

XIX.

All of the provisions and regulations of said purported License above mentioned purport to be applicable according to its terms only within said Los Angeles sales area and only to all producers and distributors engaged in business and doing business therein.

XX.

Each of the plaintiffs herein is engaged in the business of producing and/or distributing fluid milk within the said Los Angeles sales area and the above provisions of said purported License apply, according to their terms, to each of the plaintiffs in the conduct of their said business.

XXI.

Each of the plaintiffs herein purchases and/or produces all of the milk used by it in the conduct of its business entirely and exclusively within the State of California, and also sells and distributes milk produced or purchased by it entirely within said state, and none of said milk is moved or shipped outside the State of California. None of the milk produced and/or purchased

and/or sold and/or distributed by any one of the four plaintiffs herein is in, or ever enters into, the current of interstate and/or foreign commerce, but is and remains at all times entirely within the current of purely intra-state commerce.

XXII.

Said defendant Los Angeles Milk Industry Board and the individual defendants named herein as the members of said Board have demanded of these plaintiffs and each of them that they file with said Board prior to January 5, 1934, a statement as required by said purported License and set forth in Paragraph X, supra.

XXIII.

Said defendant Los Angeles Milk Industry Board, and said defendants hereinbefore named as acting as members thereof, have demanded of these plaintiffs, and each of them, that they, and each of them, deduct from the amount payable to each producer from whom each of said plaintiffs, as a distributor, purchased milk during the time commencing November 20, 1933, and ending November 30, 1933, both dates inclusive, and pay to said Board certain sums equaling in amount one-quarter cent for each pound of butter fat contained in the milk purchased by each of said plaintiffs as a distributor, and in cases where one or more of the plaintiffs are distributors having production of their own, have demanded of said plaintiffs that they deduct a like amount for each pound of butter fat contained in milk produced and sold by them during said period and pay the same to the Los Angeles Milk Industry Board; said defendants have also demanded of plaintiffs, and each of them, that whether they have production of their own

or not they pay, as distributors, to said Los Angeles Milk Industry Board sums equaling an additional amount of one-quarter cent for each pound of butter fat contained in the milk distributed by each of said plaintiffs during said period; said defendants will, unless restrained by this Court, each month make similar demands upon these plaintiffs, and each of them, demanding that plaintiffs, and each of them, deduct from the amounts payable to producers from whom they purchase milk and pay to said board sums equaling in amount one-quarter cent for each pound of butter fat contained in the milk so purchased by each of said plaintiffs and a like amount of one-quarter cent for each pound of butter fat contained in milk produced by them and an additional amount of one-quarter cent per pound of butter fat contained in all milk distributed by them. Said demands are and will be made under and by virtue of the provisions of Section III, paragraph 4 (b) of said purported License, a copy of which is hereunto annexed and marked Exhibit "A."

XXIV.

Said defendant Los Angeles Milk Industry Board and said defendants hereinbefore named as acting as members thereof have demanded of these plaintiffs, and each of them, that they, and each of them, deduct from the amount payable to each producer for whom each of said plaintiffs, as a distributor, purchased milk during the time commencing November 20, 1933, and ending November 30, 1933, both dates inclusive, and pay to said board an amount for each pound of butter fat contained in milk purchased from each of the producers who sell to said plaintiffs, equal to the average amount

which the members of the several associations or organizations of milk producers named in said purported License, are now authorizing their distributors to pay over to such associations or organizations on behalf of their respective members and that similar payments be made by plaintiffs having production of their own. That none of the producers from whom plaintiffs are so purchasing milk is a member of any of said associations or organizations. The specific amount which said defendants have demanded of these plaintiffs under this head for the period above mentioned is eight-tenths of a cent for each pound of butter fat contained in the milk so purchased and/or produced. Said defendants will, unless restrained by this Court, each month make similar demands upon these plaintiffs, and each of them, demanding that plaintiffs, and each of them, deduct from the amounts payable to producers from whom they purchased milk and pay to said board an amount equal to the average which the members of said associations or organizations are then authorizing their distributors to pay over to such associations or organizations on behalf of their respective members and demanding that similar payments be made by plaintiffs having production of their own. Said demands are and will be made under and by virtue of the provisions of Section III, paragraph 4 (c) of said purported License, a copy of which is hereunto annexed and marked Exhibit "A."

XXV.

Said defendant Los Angeles Milk Industry Board and said defendants hereinbefore named as acting as members thereof and said defendant Milk Producers, Inc., have demanded of these plaintiffs, and each of them,

that they, and each of them, deduct from the amount payable to each producer from whom each of said plaintiffs, as a distributor, purchased milk during the time commencing November 20, 1933, and ending November 30, 1933, both dates inclusive, and pay over to said defendants certain specified amounts of money calculated as provided in Section III, paragraphs 5 (a), (b), and (c) of said purported License, a copy of which is hereunto annexed and marked Exhibit "A," and have demanded that similar payments be made by plaintiffs having production of their own. That for said period said Board has determined said amount to be 29 cents per pound of butter fat, being the difference between the base price of 51 cents per pound and the surplus price of 22 cents per pound of butter fat. Said defendant will, unless restrained by this Court, each month make similar demands upon these plaintiffs, and each of them, demanding that plaintiffs, and each of them, deduct from the amounts payable to producers from whom they purchase milk and pay to said defendants sums calculated by them as provided in said Section III, paragraphs 5 (a), (b), and (c) of said purported License and demanding that similar payments be made by plaintiffs having production of their own. Said demands are and will be made under and by virtue of the provisions of said sections of said purported License.

XXVI.

Said defendants will make similar demands on these plaintiffs each month hereafter for similar payments and will do so under and by color of the said purported License.

XXVII.

On or about the 17th day of November, 1933, the Secretary of Agriculture of the United States signed a so-called marketing agreement for milk in the said Los Angeles Milk Shed, which was also signed by less than one-third of the persons, firms and corporations engaged in the business of producing and/or distributing fluid milk in the said Los Angeles sales area. None of these plantiffs signed said agreement. Said agreement is referred to in said purported License, Exhibit A. A true copy of said agreement is hereto attached, marked Plaintiffs' Exhibit B, and hereby made a part hereof as fully as if set forth verbatim. Said agreement provides for the selection of a Board to be known as the Los Angeles Milk Industry Board and its provisions in that respect are the same as those of said purported License, Exhibit A, and its provisions in other respects are similar to those of said purported License. Said agreement provides that the duties of said Board shall be to receive complaints as to violations by any contracting producer or contracting distributor of the terms and conditions of said agreement, to adjust disputes arising under said agreement between contracting producers and/or contracting distributors, to make findings of fact which may be published; to issue warnings to said persons and to take such lawful measures as may be appropriate, and if it deems it necessary, to report its findings and action with respect thereto to the Secretary for appropriate proceedings under the Act. Since the issuance of said purported License, said defendant Board and said defendant members thereof, and said defendant Berdie are interpreting said purported License to mean that the

provisions of said agreement, Exhibit "B," and particularly the provisions thereof providing for the duties of said Board and conferring powers thereon, are incorporated into and made a part of said purported License and are assuming the duties and exercising the powers just above mentioned and will, unless restrained by order of this Court, continue so to do and in particular will assume said powers and exercise said duties in relation to these plaintiffs as hereinafter set forth in detail. Since the issuance of said license, said Board is assuming the duties and exercising the powers just above mentioned and will, unless restrained by order of this court, continue to do so, and in particular will assume said powers and exercise said duties in relation to these plaintiffs as hereinafter set forth in detail.

XXVIII.

Upon failure of these plaintiffs to make to said defendants the payments unlawfully demanded and to be demanded by them as aforesaid, and to comply with other unlawful and vexatious demands of defendants, said defendants intend to and will, unless restrained by order of this Court, summon plaintiffs before them to answer to a charge of violating said purported License, and conducting business in violation thereof, and will thereupon find the plaintiffs to be guilty of violating said purported License, and will report such finding to the Secretary of Agriculture, and will advise and recommend that said purported License be revoked and cancelled so far as these plaintiffs are concerned, and that, if they continue to do business thereafter, they be proceeded against under said National Agricultural Adjustment Act for engaging in the business of distributing milk without a license.

XXIX.

That said defendant, Harry W. Berdie, as such Regional Representative, as hereinbefore set forth, has threatened and is threatening to institute proceedings before the said Secretary of Agriculture, for the cancelling of the license and rights of these plaintiffs herein to handle their individual businesses under said National Agricultural Adjustment Act. That although plaintiffs herein are not parties signatory to that certain marketing agreement entered into by the Secretary of Agriculture of the United States on or about the 17th day of November, 1933, with certain contracting producers of fluid milk produced in the Los Angeles Milk Shed and/or the Los Angeles Cream Shed, and with certain contracting distributors of fluid milk in the Los Angeles sales area, nevertheless, the said Harry W. Berdie is attempting to enforce and will enforce, unless restrained by proper order of this Court, the terms and provisions of said marketing agreement as against these plaintiffs, and has threatened to and will, unless restrained by proper order of this Court, revoke the licenses of these plaintiffs to continue in their businesses.

XXX.

Under the provisions of said National Agricultural Adjustment Act, the doing of business without a license is punishable by penalty of $1,000.00 per day. Said penalty is so unusually oppressive and unreasonable that the said plaintiffs are thereby precluded from the privilege of asserting their rights independently and challenging in the courts by defensive tactics, the validity of said purported license, and the provisions of the statute pursuant to which it purports to have been issued, without

incurring the risk of being visited with such oppressive and unreasonable penalties, that plaintiffs have no speedy and/or adequate remedy at law; and the injury to plaintiff's rights will be irreparable unless this Court shall exercise its equitable jurisdiction to issue an injunction. Moreover, the interference by said defendants with paintiffs' business unless restrained by order of this Court will be continuous, to the great and irreparable injury of plaintiffs. Said penalties imposed by said Act, which are contended and believed by plaintiffs to be not legal, are so excessive as to intimidate plaintiffs by the risk of having to pay the amount thereof, and since the ordinary method of testing the validity of said Act and purported license would subject the plaintiffs to the risk of said enormous penalties, if in error, said purported license and act deprive plaintiffs of their property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States, and plaintiffs are without remedy except in this court of equity.

XXXI.

Plaintiffs respectfully show the Court that the said purported license and the said National Agricultural Adjustment Act, in so far as it purports to authorize said purported license, are, and each of them is, void under the Constitution and laws of the United States for the following reasons, and in the following respects:

(a) Because said license constitutes an unlawful and unwarranted interference with the right of these plaintiffs to contract with the producers.

(b) Because the issuance of said license constitutes an unlawful assumption and usurpation of legislative power by the Secretary of Agriculture.

(c) Because said purported license is an attempt to impose a charge upon one individual for the benefit of other private individuals, corporations or enterprises.

(d) Because said purported license recites and finds contrary to fact that the marketing of milk in said territory designated therein as the Los Angeles Sales Area, is in the current of interstate commerce and inextricably mingled with it.

(e) Because said purported license is an attempt to regulate the business of production and sale of fluid milk and does not in any way constitute a regulation of interstate commerce.

(f) Because said purported license is an attempt to regulate purely intra-state business by Federal authorities, under the guise of regulating interstate and foreign commerce.

(g) Because said purported license is an attempt by Federal authorities to fix commodity prices to producers, distributors and consumers in the course of conducting a business which is not burdened with a public interest or duty and which is not subject to price regulation by Federal authorities or otherwise.

(h) Because said purported license deprives these plaintiffs of their property without due process of law, in violation of plaintiffs' rights, and particularly of the Fifth Amendment to the Constitution of the United States.

(i) Because said purported license and marketing agreement attempts to fix and levy an arbitrary charge to be paid to a private corporation in which plaintiffs are not members or stockholders, without any legislative authority and contrary to the provisions of Section

VIII of Article 1 of the Constitution of the United States.

(j) Because said National Agricultural Adjustment Act, in so far as it attempts to confer upon the Secretary of Agriculture the power to issue licenses and to thereby fix such terms and conditions as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy, and the restoration of normal economic conditions in the marketing of such commodities or products thereof and the financing thereof, is an unlawful and unconstitutional delegation of legislative authority to an executive officer, and violates Article I of the Constitution of the United States.

(k) Because said license as issued by said Secretary of Agriculture is not authorized by said National Agricultural Adjustment Act.

XXXII.

Plaintiffs respectfully show the Court that the acts and threatened acts of the defendants above set forth are in violation of the Constitution and laws of the United States and the rights of the plaintiffs thereunder in the respects and for the reasons set forth in Paragraph XXIX, supra.

XXXIII.

Plaintiffs further show that even if the Court should hold that said purported license and Act were valid, so far as the regulation of the marketing of milk in interstate commerce is concerned, nevertheless both said purported license and Act, and the acts and threatened acts of defendants herein set forth, are invalid as to these plaintiffs, for the reason that they are not engaged

in the marketing of milk for distribution in interstate commerce, as is above more particularly set forth.

WHEREFORE, plaintiffs pray that, in view of the irreparable injury which is about to be inflicted upon plaintiffs, and the multiplicity of penalty suits to which plaintiffs will be subjected but for the restraining process of this Court, a restraining order at once issue, enjoining the defendants and each of them from making any of the demands and commiting any of the acts with relation to these plaintiffs, above mentioned, and from taking any steps whatsoever to collect from the plaintiffs the payments above mentioned, and ordering said defendants to show cause why a temporary injunction of like character should not issue, that upon the hearing of said order to show cause a temporary injunction of like character issue and that upon final hearing said temporary injunction be made permanent.

Plaintiffs further pray that this Court adjudge and decree that said purported license is void and invalid as to these plaintiffs.

Plaintiffs pray for their costs incurred herein and for all such other and further relief as in equity they may be entitled to.

LEWIS D. COLLINGS,
AMOS FRIEDMAN,
WALTER F. HAAS,
HAROLD C. JOHNSTON,
EDWARD M. SELBY,
WILLIAM T. SELBY,
Attorneys for Plaintiffs.

(As per Order herein, a printed pamphlet containing Exhibits A and B is inserted herein, as follows:)

Form M-28

UNITED STATES
DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

MARKETING AGREEMENT SERIES—AGREEMENT NO. 23
LICENSE SERIES—LICENSE NO. 17

MARKETING AGREEMENT AND LICENSE FOR MILK—

LOS ANGELES MILK SHED

Agreement approved and executed by the Secretary of Agriculture
November 16, 1933. Effective 12:01 a.m., eastern standard time
November 17, 1933

License issued by the Secretary of Agriculture
November 16, 1933. Effective 12:01 a.m., eastern standard time
November 20, 1933

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1933

along the southern boundary line of Riverside County to a point where it intersects the eastern boundary line of Orange County; thence southwesterly along the eastern boundary line of Orange County to a point where said eastern boundary line intersects on the Pacific Coast; thence in a northwesterly direction along the Pacific Coast with its meanderings to the point of beginning; and also including the island of Santa Catalina.

E. "Los Angeles Cream Shed" means those dairy farms located in the counties of Imperial, San Luis Obispo, Tulare, Kings, Madera, Ventura, Merced, Kern, Fresno, and Santa Barbara as were producing milk for Grade A market cream on the effective date of this Agreement, and such other dairy farms as may become entitled to produce milk for Grade A market cream, in accordance with the terms of this Agreement; except (1) Those dairy farms producing any milk for distribution as fluid milk in said counties, and (2) Those farms located in said counties which are within the Los Angeles Milk Shed as defined herein.

F. "Los Angeles Milk Shed" means those dairy farms in the counties of Los Angeles, Riverside, San Bernardino, and Orange, and also those dairy farms outside said counties as were producing milk for Grade A market milk on the effective date of this agreement, and such other dairy farms as may become entitled to produce milk for Grade A market milk, in accordance with the terms of this Agreement.

G. "Los Angeles Milk Industry Board" is that Board to be organized and to have the powers and duties set forth in Exhibit D, which is attached hereto and made a part hereof.

H. "Los Angeles Cream Clearing Association" means that association (or any corporate successor thereto) composed of contracting distributors who are operating separating plants in the Los Angeles Cream Shed, and supplying Grade A market cream.

I. "Secretary" means the Secretary of Agriculture of the United States.

J. "Act" means the Agricultural Adjustment Act, approved May 12, 1933, as amended.

K. "Person" means, individual, partnership, corporation, association, and any other business unit.

The parties to this Agreement are the contracting producers, the contracting distributors, and the Secretary.

Whereas, it is the declared policy of Congress, as set forth in Section 2 of the Agricultural Adjustment Act, approved May 12, 1933, as amended—

(1) to establish and maintain such balance between the production and consumption of agricultural commodities and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; the base period in the case of all agricultural commodities except tobacco being the prewar period, August 1909–July 1914, and in the case of tobacco, the base period being the postwar period, August 1919–July 1929:

(2) to approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets; and

(3) to protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom which is returned to the farmer, above the percentage which was returned to the farmer in the pre-war period August 1909–July 1914; and

Whereas, it is understood that to effectuate such declared policy, the contracting producers shall receive a fair proportion of the financial benefits resulting to the contracting distributors from this Marketing Agreement for Milk, Los Angeles Milk Shed, and acts done pursuant thereto until parity is achieved for the contracting producers, and that subject to the foregoing, at all times, efforts will be made by the contracting distributors to yield to the consumers a fair proportion of such financial benefits and savings; and

Whereas, pursuant to the Act, the parties hereto for the purpose of correcting the conditions now obtaining in the marketing of milk produced in the Los Angeles Milk Shed and/or the Los Angeles Cream Shed and in the marketing of fluid milk distributed in the Los Angeles Sales Area, desire to enter into a marketing agreement under the provisions of Section 8 (2) of the Act; and

Whereas, associations of producers, members of Producers' Arbitration Committee, Inc., and individual producers, parties signatory hereto, market more than eighty percent (80%) of the milk produced in the Los Angeles Milk Shed and/or the Los Angeles Cream Shed and distributed and consumed as fluid milk in the Los Angeles Sales Area and such associations of producers severally represent that they have corporate power and authority to enter into this Agreement; and

Whereas, members of the Southern California Milk Dealers Association and other distributors, parties signatory hereto, distribute more than eighty percent (80%) of the fluid milk distributed in the Los Angeles Sales Area, which fluid milk comprises substantially all of the milk marketed by the associations of producers, members of the Producers' Arbitration Committee, Inc., as aforesaid; and

Whereas, the marketing of milk produced in the Los Angeles Milk Shed and the Los Angeles Cream Shed, respectively, for distribution as fluid milk in the Los Angeles Sales Area is inextricably intermingled with the marketing of milk produced for manufacturing into butter and other products manufactured from milk and cream; and

Whereas, the prices received by the contracting producers from the contracting distributors and the prices properly receivable by the contracting distributors from consumers are dependent upon the prices of butter and other products made from milk produced by the contracting producers and others within and without the State of California; and

Whereas, the marketing of milk produced in the Los Angeles Milk Shed and the Los Angeles Cream Shed for distribution as fluid milk in the Los Angeles Sales Area and the distribution of said fluid milk are in both the current of interstate and foreign commerce and the current of interstate commerce which are inextricably intermingled;

Now, therefore, the parties hereto agree as follows:

1. The schedules governing the prices at which, and the terms and conditions under which milk shall be sold by the contracting producers and purchased by the contracting distributors for distribution as fluid milk shall be those set forth in Exhibit A, which is attached hereto

and made a part hereof. Such schedules or any of them may be changed by agreement between the contracting producers and the contracting distributors, provided, however, that such changes shall become effective only upon the written approval of the Secretary.

Payments to the Producers' Arbitration Committee, Inc., made pursuant to paragraph 5, and payments to the Los Angeles Milk Industry Board, made pursuant to paragraph 4 hereof, and like payments to the Producers' Arbitration Committee, Inc., made pursuant to membership agreements, shall, respectively, be deemed part of the price paid to producers.

2. The schedules of wholesale, resale, and retail prices at which fluid milk shall be distributed and sold by the contracting distributors in the various parts of the Los Angeles Sales area shall be those set forth in Exhibit B. Such schedules or any of them may be changed by agreement between the contracting producers and the contracting distributors, provided, however, that such change shall become effective only upon the written approval of the Secretary.

3. The Production and Surplus Control Plan, attached hereto and made a part hereof, and marked "Exhibit C", shall be binding upon the contracting producers and the contracting distributors. Such Production and Surplus Control Plan may be changed by agreement between the contracting producers and the contracting distributors, provided, however, that such changes shall become effective only upon the written approval of the Secretary.

4. (*a*) Each contracting distributor agrees to file prior to the 5th day of each month with the Chairman of the Los Angeles Milk Industry Board a statement of (*a*) the quantity of milk purchased from each producer and (*b*) as to the production of such contracting distributor a statement of the quantities produced and sold as fluid milk.

(*b*) The contracting distributors agree that they will not purchase milk from any producer for distribution as Grade A Market Milk, unless such producer authorizes the purchasing contracting distributor to pay over to the Los Angeles Milk Industry Board such amount as may be determined by the Los Angeles Milk Industry Board, provided, however, that such amount shall not exceed ¼¢ for each pound of butterfat contained in the milk purchased by such contracting distributor. Contracting distributors having production of their own, agree to deduct a like amount for each pound of butterfat contained in milk produced and sold by them and to pay the same to the Los Angeles Milk Industry Board. All contracting distributors, whether such distributors have production of their own or not, agree to pay to the aforesaid Los Angeles Milk Industry Board as distributors an amount equal to that paid or deducted by them, as the case may be, as aforesaid. The Board shall use said funds for the purposes specified in Exhibit D, which is attached hereto and made a part hereof.

(*c*) The contracting distributors agree that they will not purchase milk for distribution as Grade A Market Milk from producers not members of the California Milk Producers Association, Independent Milk Producers Association, the Los Angeles County Natural Milk Producers Association, the Los Angeles Mutual Dairymen's Association, the Southern California Bottled Raw Milk Association, the Dairymen's Association, Inc., of Riverside, or the Orange County

Milk Producers, Inc., unless such producers authorize the purchasing contracting distributor to pay over to the Los Angeles Milk Industry Board an amount, for each pound of butterfat contained in milk purchased from said independent nonmember producers, equal to the average amount which the members of such associations are then authorizing the contracting distributors to pay over to such associations on behalf of their respective members, provided, however, that such deduction shall in no event exceed one cent per pound of butterfat. Contracting distributors having production of their own of milk for distribution as Grade A Market Milk and who are not members of the aforesaid associations of producers agree that for the purposes of this paragraph, they shall be deemed to have sold such milk as a producer and purchased such milk as a distributor and shall make payment to the Los Angeles Milk Industry Board accordingly.

Said average amount shall be determined for each month by the Los Angeles Milk Industry Board by (1) multiplying the amount per pound of butterfat authorized to be deducted in respect to each such Association by the number of pounds for which the deduction is so authorized, (2) adding the several amounts thus arrived at, and (3) dividing the resulting sum by the total number of pounds for which members of said Associations of Producers have in the aggregate authorized deductions, the resulting figure being the average amount to be deducted for said month in the case of such nonmember producers.

The sum so paid shall be kept as a separate fund by said Los Angeles Milk Industry Board for the purpose of securing to said producers not members of the above-mentioned producers' associations, advertising, educational, credit loss, and other benefits similar to those which are secured by the members of the aforesaid producers' associations by virtue of their like payments to said producers' associations. The contracting producers and contracting distributors undertake that said Los Angeles Milk Industry Board shall disburse such funds for the purposes hereinabove provided, and that said Los Angeles Milk Industry Board shall keep separate books and records in a form satisfactory to the Secretary pertaining to such funds, which said books and records of the Los Angeles Milk Industry Board shall be subject to examination of the Secretary during the usual hours of business, and that the Los Angeles Milk Industry Board shall from time to time furnish to the Secretary such information as the Secretary may require.

(*d*) The deductions which are thus made, pursuant to paragraphs 4 (*b*) and (*c*) shall be paid to the Los Angeles Milk Industry Board at the time provided in this Agreement for making payment to producers for milk purchased.

5. (*a*) The contracting distributors agree that they will not purchase milk for distribution as Grade A Market Milk from any producer who is not a member of any of the associations of producers listed in Paragraph 4 unless such producer authorizes the contracting distributor to whom such producer is delivering milk to deduct or cause to be deducted by the particular association of producers of which any such producer is a member, each month, the following: (1) For the deliveries of such producer in excess of such part thereof as was classified as base milk pursuant to the provisions of Exhibit C for such

month, a sum equal to the difference between the base price for said milk and the surplus price for said milk, both prices to be determined pursuant to the provisions of Exhibit A, Schedule I, and of Exhibit A, Schedule III; and (2) for that part of the deliveries of each such producer not in excess of the producer's base determined pursuant to the provisions of Exhibit C, the difference between the base price payable for said milk pursuant to the provisions of the aforesaid schedules of Exhibit A and the adjusted base price determined according to the provisions of the said schedules of Exhibit A and the provisions of Exhibit C. Every month such contracting distributor or every such association of producers agree to pay the said sums so deducted to the Producers' Arbitration Committee, Inc., as provided in Exhibit C, for the purpose of equitably allocating the loss involved in handling surplus milk.

(*b*) The contracting distributors agree that they will not purchase milk for distribution as Grade A Market Milk from any producer who is not a member of any of the associations of producers listed in Paragraph 4 unless such producer authorizes the contracting distributor to whom such producer is delivering milk to deduct, each month, the following: (1) For the deliveries of such producer in excess of such part thereof as was classified as base milk pursuant to the provisions of Exhibit C for such month, a sum equal to the difference between the base price for said milk and the surplus price for said milk, both prices to be determined pursuant to the provisions of Exhibit A, Schedule I, and of Exhibit A, Schedule III; and (2) for that part of the deliveries of each such producer not in excess of the producer's base determined pursuant to the provisions of Exhibit C, the difference between the base price payable for said milk pursuant to the provisions of the aforesaid schedules of Exhibit A and the adjusted base price determined according to the provisions of said schedules of Exhibit A and the provisions of Exhibit C. Every such contracting distributor agrees to pay the said sums so deducted to the Producers' Arbitration Committee, Inc., as provided in Exhibit C, for the purpose of equitably allocating the loss involved in handling surplus milk.

(*c*) Each contracting distributor having production of his own of milk for distribution as Grade A Market Milk agrees to pay each month the following sums to the Producers' Arbitration Committee, Inc., as provided in Exhibit C for the purpose of equitably allocating the loss of handling surplus milk: (1) For such production of such distributor in excess of such part thereof as was classified as base milk pursuant to the provisions of Exhibit C for such month, a sum equal to the difference between the base price of said milk and the surplus price of said milk, both prices to be determined pursuant to the provisions of Exhibit A, Schedule III; and (2) for that part of the production of each such distributor not in excess of the base determined pursuant to the provisions of Exhibit C, the difference between the base price payable for said milk pursuant to the provisions of the adjusted schedules of Exhibit A and the adjusted base price determined according to the provisions of the said schedules of Exhibit A and the provisions of Exhibit C.

6. The contracting producers and the contracting distributors hereby agree that they will abide by the Cream Buying Plan, which is attached hereto as Exhibit F and made a part hereof.

7. The contracting producers and the contracting distributors hereby agree that they will abide by the Rules of Fair Practices, which are attached hereto as Exhibit E and made a part hereof.

8. All contracting producers, not members of any of the above-mentioned producers' associations, shall be permitted to become members of any one of such producers' associations on an equal basis with existing members similarly circumstanced.

9. The contracting parties shall severally maintain systems of account which accurately reflect the true account and condition of their respective businesses. Their respective books and records shall during usual hours of business be subject to the examination of the Secretary to assist him in the furtherance of his duties with respect to this agreement. The contracting parties shall severally, from time to time, furnish such information to the Secretary as the Secretary may request, including information on and in accordance with forms to be supplied by him. All information obtained by or furnished to the Secretary pursuant to this paragraph shall remain the confidential information of the Secretary, and shall not be disclosed by him except upon lawful demand made by the President, or by either House of Congress, or any committee thereof, or by any court of competent jurisdiction. The Secretary, however, may combine and publish the information obtained from contracting producers and/or contracting distributors in the form of general statistical studies or data. The Secretary hereby agrees to issue regulations and prescribe penalties to be imposed in the event of any violation of the confidences or trust imposed hereby.

10. The standards governing the production, receiving, transportation, processing, bottling, and distribution of fluid milk, sold or distributed in the Los Angeles Sales Area shall be those established by the State, County, and City health ordinances and regulations, of any of the municipalities in which said milk is sold, and in addition such other requirements, not conflicting with such ordinances and regulations, as may from time to time be established by the Los Angeles Milk Industry Board, with the approval of the Secretary, and also in the case of milk purchased for distribution as Grade A Market Cream those which are set forth in Exhibit F of this Agreement.

11. This agreement shall become effective at such time as the Secretary may declare above his signature attached hereto, and this agreement shall continue in force until the last day of the month following the aforesaid effective date, and thereafter from month to month, except that:

(*a*) The Secretary may at any time terminate this agreement by giving notice by means of a press release or in any other manner which the Secretary may determine.

(*b*) The Secretary may, for good cause shown, at any time terminate this agreement as to any party signatory hereto, by giving notice in writing by registered mail and addressed to such party at the address of such party on file with the Secretary.

(*c*) The Secretary shall terminate this agreement upon the request of 75% of the Contracting Producers or 75% of the Contracting Distributors, such percentages to be measured by the volume of milk marketed or distributed respectively, by giving notice in the same manner as provided in subdivision (*a*) above.

(*d*) This agreement shall in any event terminate whenever the provisions of the Act authorizing it shall cease to be in effect.

12. The benefits, privileges, and immunities conferred by virtue of this Agreement shall cease upon its termination except with respect to acts done prior thereto, and the benefits, privileges, and immunities conferred by virtue of this Agreement upon any party signatory hereto shall cease upon its termination as to such party except as to acts done prior thereto.

13. The contracting producers and contracting distributors shall use their best efforts to assure the observance of the terms and conditions of this Agreement by such producers and distributors. Subject to such regulations as the Secretary may prescribe, the contracting producers and contracting distributors do hereby establish the Los Angeles Milk Industry Board, and do charge such Board, or such additional agencies as it may deem necessary, with the following duties, in addition to those specifically set forth elsewhere in this Agreement, (a) receive complaints as to violations by any contracting producer or contracting distributor of the terms or conditions of this Agreement, (b) adjust disputes arising under this Agreement between contracting producers and/or contracting distributors, (c) make findings of fact which may be published, (d) issue warnings to such persons, and (e) take such lawful measures as may be appropriate; such agency or agencies if it or they deem it necessary, shall report its or their findings and action with respect thereto to the Secretary for appropriate proceedings under the Act.

The findings and/or decisions of the Los Angeles Milk Industry Board on disputes referred to such Board shall be conclusive upon the contracting producers and the contracting distributors.

14. This Agreement may be executed in multiple counterparts which, when signed by the Secretary, shall constitute, taken together, one and the same instrument as if all such signatures were contained in one original.

15. After this Agreement first takes effect, any producer or association of producers of milk in the Los Angeles Milk Shed or in the Los Angeles Cream Shed, or any distributor of fluid milk may become a party to this Agreement, if a counterpart thereof is executed by him and by the Secretary. The Agreement shall take effect as to such producer or distributor at such time as the Secretary may declare above his signature attached to such counterpart, and the benefits, privileges, and immunities conferred by this Agreement shall then be effective as to such producer or distributor.

16. The contracting distributors hereby apply for and consent to licensing by the Secretary subject to Milk Regulations, Series 1, and General Regulations, Series 3, of the Agricultural Adjustment Administration, together with the Amendments thereto prescribed by the Secretary and approved by the President, and subject to terms and conditions not inconsistent with the purpose and effect of this Agreement and not otherwise.

17. Nothing herein contained shall be construed in derogation of the rights of the Secretary to exercise any powers granted him by the Act and, in accordance with such powers, to act in the premises whenever he shall deem it advisable.

18. The contracting distributors agree that they will purchase all of their milk requirements of Grade A Market Milk and Grade A Milk for standardization purposes (provided such milk meets all the health requirements provided for in this Agreement and

provided such milk is produced by producers who have established bases) from producers in the Los Angeles Milk Shed. Producers' Arbitration Committee agrees that it will purchase and pay contracting producers of Grade A Market Milk for all such milk which is delivered to its surplus plant (provided such milk meets all the health requirements provided for in this Agreement and provided such milk is produced by producers who have established bases). The contracting distributors agree that they will purchase all of their milk requirements of Grade A Market Cream from Grade A milk producers in the Los Angeles Cream Shed (provided such milk meets all the health requirements provided for in this Agreement).

19. The Secretary may name any person to act as his agent in connection with any of the provisions contained herein to be performed by the Secretary.

In witness whereof, the contracting producers and the contracting distributors, acting under the provisions of the Agricultural Adjustment Act, for the purpose and within the limitations herein contained, and not otherwise, have hereunto set their respective hands and seals.

Independent Milk Producers Association, by Wm. McComie, vice president, David P. Howells, secretary; Milk Producers, Inc., by F. F. Pellissier, president, O. W. Strodthoff, assistant secretary; Knudsen Creamery Co., Visalia Producers Group, by D. J. Toomey, Bernard Goodreau, J. W. Schroepfer; Golden State Company, Tulare Producers Group, by L. E. Robertson, L. R. Amual; Adohr Milk Farms, Tulare Producers Group, by Manuel Rocha, John W. Sturgeon, Joe S. Simas; Western Dairy Products, Tipton Producers Group, by Dan Freitas, M. V. Cardoza; Peacock Dairies, Inc., by A. S. Goode, president; Los Angeles Mutual Dairymen, by Ray King, president; Dairymen's Cooperative Creamery Association, by Joe N. Gill, president, W. J. Higdon, secretary; Southern California Bottled Raw Milk Association, by S. F. Fanning, president, W. P. Blodgett, secretary; Los Angeles County Natural Milk Association, by A. F. Holt, president, F. B. Carpenter, secretary; Western Consumers Feed Company, by Gail M. McDowell, president, E. M. Sheller, secretary; Star Hay Company, by Gail M. McDowell, president, W. E. Kinsey, secretary; Roger Jessup Certified Farm, by Roger Jessup; California Milk Producers Association, by T. M. Erwin, president, Nels Lautrup, assistant secretary; Orange County Milk Producers, Inc., by R. F. Hazard, vice president, C. H. Christie, secretary; Colnbrook Creamery Corporation, by F. E. Voorhees, president, H. O. Smith, secretary; Mayfair Creamery, by Earl Brunner; Jersey Cream Supply Company, by M. I. Alfred; Guaranteed Dairy, by E. A. Wakeham; Wilsey Dairy, by L. T. Wilsey; Pomegranate Dairy, by Robert H. Easton; Orangehurst Dairy, by David Giddings; Yellis Dairy, by Elmer Byers; Raitts Rich

Milk, by J. T. Raitt, president, W. H. Kuhn, secretary; Cedar Crest Dairy, by O. D. Thomas; Wilson's Dairy, by Harry W. Wilson; C. M. Hill Dairy, by C. M. Hill; Excelsior Creamery Company, by W. D. Ranney, president, D. G. Tidball, secretary; Blue Ribbon Dairy, by H. K. McIlvain; Southland Dairies, Ltd., by R. L. Anderson, president; Crown City Dairy Company, by A. G. Marcus, president, D. A. Marcus, secretary; Hollenbeck Dairy Farms, by Pierre Vahore; Southwestern Dairy Company, by Lee B. Bevier, R. E. Love; Fosselman Creamery Company, by H. R. Orme, C. V. Ringhoff; East Los Angeles Dairy, by F. C. Wahrman; Airway Dairy, by S. S. Duntley; Santa Monica Dairy Company, by H. Michel, president, Clarence A. Michel, secretary; Milk Distributors Association, by O. Moen, president, Burt B. Corliss, secretary; Harbor Creameries, Inc., by C. T. Fitzhugh, president; Watson Dairy Products Company, by Paul A. Watson; Whittier Sanitary Dairy Company, by M. C. Lautrup, president, H. M. Butts; Cloverdale Creamery Company, by Wm. L. Houghton, president, G. A. Cameron, secretary; Dairymen's Association, Inc., by R. C. Gerber, president, E. L. Vehlow, secretary; Santa Rita Dairy Company, by R. D. Weaver; Mount View Dairy, by J. W. Bartlett; Lakeview Creamery Company, by C. M. Gregory, president, S. Y. Allen, secretary; Pellissier Dairy Farms, by Frank L. Pellissier; Lakeview Dairy Farms, by B. C. Decker; Peoples Milk Company, by J. M. Sparks; Hollow Hill Dairy, by T. H. Brice, owner; Model Farms, Ltd., by John S. Grady, president, Louis Burke, secretary; Western Dairy Products, Inc., by K. L. Carver, vice president, J. F. Holt, assistant secretary; Challenge Cream & Butter Association, by W. J. Higdon, president, C. L. Mitchell, secretary; Danish Creamery Association, by W. F. McMaster, president, Ed R. Hamner, secretary.

Whereas, it is provided by Section 8 of the Agricultural Adjustment Act approved May 12, 1933, as amended, as follows:

SEC. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power—

To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of this Act.

Whereas, due notice and opportunity for hearing to interested parties has been given pursuant to the provisions of the Act and the regulations issued thereunder, and

Whereas, it appears, after due consideration, that this is a marketing agreement between the Secretary and persons engaged in the handling

of milk and its products within the meaning of said Act in the current of interstate and foreign commerce; and

Whereas, it appears, after due consideration, that the aforesaid Marketing Agreement will tend to effectuate the policy of Congress set forth in Section 2 of the Agricultural Adjustment Act in that such Marketing Agreement will:

(*a*) Establish and maintain such balance between the production and consumption of milk and such marketing conditions therefor, as will reestablish prices to the producers thereof at a level that will give such agricultural commodity a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of such agricultural commodity in the base period, as defined in Section 2 of said Act; and (*b*) approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is possible in view of the current consumptive demand in domestic and foreign markets; and

(*c*) Protect the consumer's interest by retaining the production of such agricultural commodities at such level as will not increase the percentage of the consumers' retail cost for such agricultural commodities or products derived therefrom which was returned to the farmer above the percentage which was returned to the farmer in the pre-war period August 1909–July 1914, and

Whereas, I herewith give notice that—

1. The terms and conditions of this Agreement are agreed to as reasonable in the light of conditions now prevailing in the Los Angeles Sales Area, in the Los Angeles Milk Shed, and/or Los Angeles Cream Shed, and are not to be regarded as a precedent for marketing agreements for other milk sheds or for future marketing agreements for the Los Angeles Sales Area, the Los Angeles Milk Shed, and/or Los Angeles Cream Shed, and

2. The Secretary reserves the privilege of approving a blanket marketing agreement, pursuant to Section 8 (2) of the Act, for all milk sheds, which blanket marketing agreement may make specific modifications for any particular designated milk shed to conform to the conditions then prevailing in such specific milk shed.

Now, therefore, I, Henry A. Wallace, Secretary of Agriculture, acting under the provisions of the Agricultural Adjustment Act for the purposes and within the limitations therein contained, and not otherwise, do hereby execute this agreement under my hand and the official seal of the Department of Agriculture, in the City of Washington, District of Columbia, on this 16th day of November, 1933, and pursuant to the provisions hereof declare this Agreement to be effective on and after November 17, 12:01 A.M. Eastern Standard Time.

H A Wallace

Secretary of Agriculture.

EXHIBIT A

PRICES TO BE PAID PRODUCERS

SCHEDULE I

PRICES FOR GRADE A MARKET MILK DELIVERED IN BULK (EXCEPT MILK DELIVERED TO PLANTS IN THE COUNTIES AND FOR THE PURPOSES SET FORTH IN SCHEDULE II)

(*a*) The prices (herein termed base prices) to be paid by contracting distributors for Grade A Market Milk, delivered in bulk f.o.b. distributors' processing plants in Los Angeles, shall be determined in accordance with the following schedule, which provides that changes in the Los Angeles market quotations for 92-score butter shall result in a change in the base price to be paid per pound of butterfat, only after a definite discrepancy between the butter quotations and the existing price base appears. Such discrepancy shall be deemed to have appeared whenever such closing market quotation shall have moved into the section next below or next above the existing quotations, as provided in the following schedule, and shall have remained in such section for seven consecutive days. In such event, corresponding revisions in the base price shall be made on the second day next succeeding such seven-day period. Provided, however, that if, in the opinion of the Los Angeles Milk Industry Board a revision in the base price resulting from making Section 1 applicable may not be justified by economic conditions, the Los Angeles Milk Industry Board may postpone such revision for not exceeding ten days following such seven-day period for the purpose of making an economic survey and report to the Secretary. Following such economic survey and report, the Los Angeles Milk Industry Board may, with the approval of the Secretary, further postpone such revision for such time as it may recommend and the Secretary may approve.

	Los Angeles market quotation 92-score butter	Total base price per pound butterfat
Section 1	$0.00 to .20	$0.45
Section 2	.201 .25	.51
Section 3	.251 .30	.61

(*b*) The contracting distributors agree that, for the purpose of standardizing milk for market, they will purchase and use only Grade A milk, purchased at the above prices.

(*c*) The foregoing base prices are payable by contracting distributors in respect of all milk delivered to them, but in accounting for the same they shall—

(1) On all of such deliveries of producers not in excess of such producer's base as determined under the provisions of Exhibit C, pay to each producer the foregoing prices adjusted as provided in Exhibit C, and pay the difference between the base price and the adjusted base price to Producers' Arbitration Committee, Inc., as provided under Paragraphs 5 (*a*) and 5 (*b*) of this agreement, except in those cases where the contracting distributor is paying the full base price to any of the associations of producers listed in Paragraph 4 of this agreement and such association of producers is itself paying to Producers' Arbitration Committee, Inc., the difference between the adjusted base price and the base price determined as aforesaid.

(2) On all such deliveries in excess of producer's base determined as aforesaid, pay to each producer the surplus price, as established pursuant to the provisions of this exhibit hereinafter set forth, and pay to the Producers' Arbitration Committee, Inc., the difference between the base price and the surplus price, except in those cases where the contracting distributor is paying the full base price to any of the associations of producers listed in Paragraph 4 of this agreement and such association of producers is itself paying to Producers' Arbitration Committee, Inc., the difference between the base price and the surplus price determined as aforesaid.

(3) Distributors having production of their own shall as to such production pay monthly to Producers' Arbitration Committee, Inc., the difference between the base price and the adjusted base price as provided under Paragraph 5 (*c*) of this Agreement; and shall on such production in excess of such distributors' base as a producer pay monthly to the Producers' Arbitration Committee, Inc., the difference between the base price and the surplus price.

(*d*) *Surplus price.*—Milk delivered by producers to contracting distributors in excess of quantities representing the base of each such producer shall be paid for at the surplus price, and distributors having production of their own may retain on account of such production in excess of their established bases as producers the surplus price. The surplus price shall be the montly average of the daily quotation for ninety-two score butter prevailing on the Los Angeles market during the month in which such milk is to be accounted for.

(*e*) *Where the milk passes through a country receiving station* the following deductions per pound of butterfat shall be made.

A. The cost of transportation from the country receiving station to Los Angeles according to truck hauling tariff of the California State Railway Commission plus an allowance of four cents (4¢) per pound butterfat for preparation of such shipment.

B. If delivery is taken at the producer's ranch, in addition to the foregoing deduction, the actual reasonable cost of hauling to the country receiving station, not exceeding three cents (3¢) per pound butterfat.

SCHEDULE II

PRICES FOR MILK DELIVERED IN BULK TO PLANTS IN CERTAIN COUNTIES FOR SEPARATION INTO CREAM AND SKIMMED MILK AND/OR FOR PROCESSING INTO BUTTERMILK, CONDENSED MILK, COTTAGE CHEESE, OR SKIMMED MILK POWDER

1. The minimum buying price per pound of butterfat to be paid by the processing plants in the several counties listed below for milk

delivered in bulk for the purposes set forth in the heading of this Schedule II shall be:

(*a*) The monthly average of the daily quotations in Los Angeles for 92 score butter for the month in which deliveries are made to such plant, plus the premiums which may prevail according to the schedules set forth in paragraphs (*b*) and (*c*) below in the several counties listed below when the quotations of Section 1, Section 2, and Section 3, respectively, of Exhibit A and revised base prevail.

	When section 1 prevails	When section 2 prevails	When section 3 prevails
(*b*) County—			
Merced	$0. 06	$. 09	$0. 13
Fresno	. 06½	. 09½	. 13½
Tulare	. 06¾	. 09¾	. 13¾
Kings	. 06¾	. 09¾	. 13¾
Santa Barbara	. 06¾	. 09¾	. 13¾
Imperial	. 06¾	. 09¾	. 13¾
Kern	. 07¼	. 10¼	. 14¼

(*c*) In addition to the above premiums, add the following premiums for solids-not-fat values. When the average monthly carload price at Los Angeles of Roller Process powdered skim milk, as determined by the Los Angeles Milk Industry Board from available data, is:

3¼ cents per pound, add ½ cent per pound of butterfat
3½ cents per pound, add 1 cent per pound of butterfat
3¾ cents per pound, add 1½ cents per pound of butterfat
4 cents per pound, add 2 cents per pound of butterfat
4¼ cents per pound, add 2½ cents per pound of butterfat
4½ cents per pound, add 3 cents per pound of butterfat
4¾ cents per pound, add 3½ cents per pound of butterfat
5 cents per pound, add 4 cents per pound of butterfat
5¼ cents per pound, add 4½ cents per pound of butterfat
5½ cents per pound, add 5 cents per pound of butterfat
5¾ cents per pound, add 5½ cents per pound of butterfat
6 cents per pound, add 6 cents per pound of butterfat

2. The foregoing prices shall be subject to the terms and conditions set forth in the Cream Buying Plan which is attached hereto as Exhibit F.

SCHEDULE III

Prices for Raw Grade A Market Milk Delivered in Bottles to Contracting Distributors (Except to Stores)

(*a*) The following schedule of minimum buying prices to be paid to "Contracting Producers" by "Contracting Distributors" (except stores) for bottled Grade A raw milk shall prevail when the conditions set forth in Sections 1, 2, and 3, respectively, of Exhibit A and revised base price prevail:

	Price paid to producers (per quart)
When conditions of Section 1 prevail	$0. 05¼
When conditions of Section 2 prevail	. 06
When conditions of Section 3 prevail	. 06¾

(Milk Industry Board shall as soon as reasonably practicable after the effective date of this Agreement investigate the justifiability of the foregoing prices, and shall within thirty days after the effective date of this Agreement report its findings to the Secretary, together with such recommendations as to the amendment of the Agreement as in its opinion seem desirable. The contracting producers and the contracting distributors agree to abide by the decision of the Secretary in respect to any such amendment.)

(*b*) Such milk shall be delivered by producers to distributors' city processing plant bottled and iced in cases. Distributors will furnish bottles, cases, and caps.

(*c*) For the purpose of making the adjustments provided for in this Schedule III and in Exhibit C, the foregoing prices per quart of bottled milk shall be reduced to base prices per pound of butterfat (1) on the basis that each such quart contains milk with 4 percent butterfat content, and (2) so as to eliminate from the said adjustment all extra cost relating to the bottling and handling of the bottle product. Accordingly the base price of such milk shall be determined in the following manner.

(1) Each quart of milk shall be taken to be the equivalent of 0.086 pound of butterfat.

(2) Multiply the total number of quarts delivered by 0.086; the resulting figure will be the number of pounds of butterfat deemed to have been delivered.

(3) The base price per pound of butterfat shall be—

When conditions of Section 1 prevail	$0. 45
When conditions of Section 2 prevail	. 51
When conditions of Section 3 prevail	. 61

(*d*) The prices set forth in paragraph A are payable by contracting distributors in respect of all milk delivered to them, but in accounting for the same they shall—

(1) On all of the deliveries of such producer not in excess of such producer's base as determined under the provisions of Exhibit C, pay to each producer the difference between the foregoing prices per quart of bottled milk as set forth in paragraph (*a*) for all quarts delivered and the base price per pound of butterfat as set forth in paragraph (*c*) for all pounds of butterfat delivered; and pay each producer the base price adjusted as provided in Exhibit C, and pay the difference between the base price and the adjusted base price to Producers' Arbitration Committee, Inc., as provided under Paragraphs 5 (*a*), 5 (*b*), and 5 (*c*) of this agreement, except in those cases where the contracting distributor is paying the full base price to any of the associations of producers listed in paragraph 4 of this agreement and such association of producers is itself paying to Producers' Arbitration Committee, Inc., the difference between the base price and the adjusted base price determined as aforesaid.

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(2) On all deliveries in excess of producer's base determined as aforesaid, pay to each producer the difference between the foregoing prices per quart of bottled milk as set forth in paragraph (*a*) for all quarts delivered and the base price per pound of butterfat as set forth in paragraph (*c*), for all pounds of butterfat delivered; and pay each producer the surplus price, as established pursuant to the provisions of this exhibit hereinafter set forth, and pay to the Producers' Arbitration Committee, Inc., the difference between the base price and the surplus price, except in those cases where the contracting distributor is paying the full base price to any of the associations of producers listed in paragraph 4 of this agreement and such association of producers is itself paying to Producers' Arbitration Committee, Inc., the difference between the base price and the surplus price determined as aforesaid.

Surplus price.—Milk delivered by producers to contracting distributors in excess of quantities representing the base of each such producer shall be paid for at a surplus price to be established as follows:

The surplus price shall be the monthly average of the daily quotation for 92 score butter prevailing on the Los Angeles Market for the month in which deliveries by producers have been made.

EXHIBIT B

SELLING PRICES

1. *General provisions applicable to all schedules of the exhibit.*—The minimum prices set forth in the following schedules are based on milk containing an average butterfat content of 4%, subject to a tolerance for normal fluctuations of 0.2 of one percent up or down for any 30-day period.

2. Any distributor, who, during any 30-day period, has sold milk in bulk or bottles averaging a butterfat content in excess of 4.2%, but not in excess of 4.5%, shall for the next succeeding 30-day period increase the selling price stipulated in the following schedules for like quality milk at the rate of 1¢ per quart. Any distributor who, during any 30-day period, has sold milk in bulk or bottles, averaging a butterfat content in excess of 4.5% but not in excess of 5% shall, in addition to the above increase, increase the selling price for like quality milk at the rate of 1¢ per quart, and if the aforesaid average butterfat content shall exceed 5%, the distributor shall increase selling prices for like quality milk by an additional 1¢ for each additional 0.5 of one percent of butterfat contained in said milk over 5%.

3. Prices are for bottled milk unless otherwise specified.

4. The above price schedules do not include any occupational or sales tax imposed by the laws of any State, nor shall any deduction from said price schedules be made in any case therefor.

5. Peddlers shall sell all products at the established retail and wholesale prices, respectively.

6. Sales of milk by the Contracting Distributors to any unemployment relief agency may be at prices below those set forth in Exhibit B.

7. With the exception of Guaranteed and Certified Milk in which the extra cost of double capping required by law is already included in the price schedule, all bottled milk or other fluid dairy products sealed with double or protective caps shall carry a minimum charge of at least one cent (1 cent) per container.

8. Sales of articles in containers shall be made only in containers of the sizes and types specified, and where a grade and/or percentage of butterfat content is specified, only at the specified grade and/or percentage of butterfat.

9. The Los Angeles Milk Industry Board shall, as soon as reasonably practicable after the effective date of this Agreement, investigate the prices of "Milk Grade A Pasteurized" and "Raw Milk Grade A" as a class, and "Guaranteed Milk" and "Raw Milk Certified" as another class, and the relationship between the two classes; and shall within thirty days after the effective date of this Agreement report its findings to the Secretary together with such recommendations as to the amendment of the Agreement as in its opinion seem desirable. The contracting producers and the contracting distributors agree to abide by the decision of the Secretary in respect to any such amendment.

SCHEDULE I

Los Angeles Sales District

(Includes all territory in the Los Angeles Sales Area except that specified as included in the San Bernardino Sales District and the Orange County Sales District.)

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 1 of Exhibit A and revised base is in effect:

	Wholesale prices	Store selling prices	Home delivered prices
Milk, Grade A, pasteurized:			
10-gallon cans	$2.50		
3-gallon cans	.80		
2-gallon cans	.55		
1-gallon can	.30		
Quarts	.07½	$0.09	$0.10
Pints	.05	.06	.07
Third quarts	.04		
Half pints	.03		
Raw milk, Grade A:			
Quarts	.07½	.09	.10
Pints	.05	.06	.07
Third quarts	.04		
Half pints	.03		
Guaranteed milk:			
Quarts	.11	.12	.13
Pints	.06	.07	.08
Third quarts	.05½		
Half pints	.04½		
Raw milk, certified:			
Quarts	.13	.15	.15
Pints	.08	.10	.10
Third quarts	.06		
Half pints	.05		
Chocolate drink, quarts	.07½	.09	.10
Coffee cream, 22 percent:			
10-gallon cans	8.50		
3-gallon cans	2.70		
2-gallon cans	1.80		
Quarts	.25	.35	.35
Pints	.15	.20	.22
Half pints	.09	.11	.12
Table cream, 27 percent:			
10-gallon cans	10.00		
3-gallon cans	3.15		
2-gallon cans	2.10		
Quarts	.28	.40	.40
Pints	.17	.22	.25
Half pints	.11	.13	.14
Whipping cream, 38 percent:			
10-gallon cans	14.00		
3-gallon cans	4.65		
2-gallon cans	3.10		
Quarts	.40	.60	.60
Pints	.27	.35	.37
Half pints	.15	.18	.20
Sour cream:			
Gallons	1.00		
Half pints	.08	.10	.11

	Wholesale prices	Store selling prices	Home delivered prices
Churned buttermilk:			
10-gallon cans	$2.00	----------	----------
3-gallon cans	.75	----------	----------
2-gallon cans	.50	----------	----------
1-gallon cans	.30	----------	----------
Quarts	.07½	$0.09	$0.10
Third quarts	.04	----------	----------
Half pints	.03	----------	----------
Skim milk:			
10-gallon cans	1.40	----------	----------
3-gallon cans	.32	----------	----------
1-gallon cans	.16	----------	----------
Quarts	.06	.07	.08
Creamed cottage cheese:			
Pounds, bulk	.11	.15	----------
Cartons or jars, 10-ounce or less	.08	.10	.10
Nonreturnable glass, 10-ounce or less	.09	.11	.11

SCHEDULE II

Los Angeles Sales District

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotations of 92 score butter is such that Section 2 of Exhibit A and revised base is in effect:

	Wholesale prices	Store selling prices	Home delivered prices
Milk, Grade A, pasteurized:			
10-gallon cans	$2.85	----------	----------
3-gallon cans	.90	----------	----------
2-gallon cans	.65	----------	----------
1-gallon cans	.34	----------	----------
Quarts	.08½	$0.10	$0.11
Pints	.06	----------	----------
Third quarts	.04½	----------	----------
Half pints	.03½	----------	----------
Raw milk, Grade A:			
Quarts	.08½	.10	.11
Pints	.06	.07	.08
Third quarts	.04½	----------	----------
Half pints	.03½	----------	----------
Guaranteed milk:			
Quarts	.12	.13	.14
Pints	.07	.08	.09
Third quarts	.06	----------	----------
Raw milk, certified:			
Quarts	.14	.16	.16
Pints	.09	.11	.11
Third quarts	.06½	----------	----------
Half pints	.05½	----------	----------
Chocolate drink, quarts	.08½	.10	.11
Coffee cream, 22 percent:			
10-gallon cans	9.50	----------	----------
3-gallon cans	3.20	----------	----------
2-gallon cans	2.20	----------	----------
Quarts	.30	.38	.40
Pints	.17	.22	.24
Half pints	.10	.12	.13

	Wholesale prices	Store selling prices	Home delivered prices
Table cream, 27 percent:			
10-gallon cans	$11. 50		
3-gallon cans	3. 65		
2-gallon cans	2. 50		
Quarts	. 33	$0. 43	$0. 45
Pints	. 19	. 24	. 27
Half pints	. 12	. 14	. 15
Whipping cream, 38 percent:			
10-gallon cans	15. 50		
3-gallon cans	5. 50		
2-gallon cans	3. 65		
Quarts	. 48	. 65	. 68
Pints	. 30	. 38	. 40
Half pints	. 17	. 20	. 22
Sour cream:			
Gallon	1. 10		
Half pints	. 09	. 11	. 12
Churned buttermilk:			
10-gallon cans	2. 40		
3-gallon cans	. 85		
2-gallon cans	. 60		
1-gallon cans	. 34		
Quarts	. 08½	. 10	. 11
Third quarts	. 04½		
Half pints	. 03½		
Skim milk:			
10-gallon cans	1. 60		
3-gallon cans	. 55		
2-gallon cans	. 40		
1-gallon cans	. 20		
Quarts	. 07	. 08	. 09
Creamed cottage cheese:			
Pounds, bulk	. 12	. 16	
Cartons or jars, 10 ounces or less	. 09	. 11	. 11
Nonreturnable glass, 10 ounces or less	. 10	. 12	. 12

SCHEDULE III

Los Angeles Sales District

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles market quotation of 92 score butter is such that Section 3 of Exhibit A and revised base is in effect:

	Wholesale prices	Store selling prices	Home delivered prices
Milk, Grade A:			
10-gallon cans	$3. 15		
3-gallon cans	1. 00		
2-gallon cans	. 72		
1-gallon cans	. 38		
Quarts	. 09½	$0. 11	$0. 12
Pints	. 07	. 08	. 09
Third quarts	. 05		
Half pints	. 04		

	Wholesale prices	Store selling prices	Home delivered prices
Raw milk, Grade A:			
Quarts	$0.09½	$0.11	$0.12
Pints	.07	.08	.09
Third quarts	.05		
Half pints	.04		
Guaranteed milk:			
Quarts	.13	.14	.15
Pints	.08	.09	.10
Third quarts	.06½		
Half pints	.05½		
Raw milk, certified:			
Quarts	.15	.17	.17
Pints	.10	.12	.12
Third quarts	.07		
Half pints	.06		
Chocolate drink, quarts	.09½	.11	.12
Coffee cream, 22 percent:			
10-gallon cans	11.00		
3-gallon cans	3.55		
2-gallon cans	2.45		
Quarts	.34	.42	.44
Pints	.19	.25	.27
Half pints	.11	.13	.14
Table cream, 27 percent:			
10-gallon cans	13.00		
3-gallon cans	4.10		
2-gallon cans	2.80		
Quarts	.40	.50	.52
Pints	.21	.26	.29
Half pints	.13	.15	.16
Whipping cream, 38 percent:			
10-gallon cans	18.00		
3-gallon cans	6.15		
2-gallon cans	4.10		
Quarts	.53	.70	.73
Pints	.36	.44	.46
Half pints	.19	.22	.24
Sour cream:			
Gallon	1.25		
Half pints	.10	.12	.13
Churned buttermilk:			
10-gallon cans	2.70		
3-gallon cans	.95		
2-gallon cans	.70		
1-gallon cans	.38		
Quarts	.09½	.11	.12
Third quarts	.05		
Half pints	.04		
Skim milk:			
10-gallon cans	1.80		
3-gallon cans	.65		
2-gallon cans	.48		
1 gallon cans	.25		
Quarts	.08	.09	.10
Creamed cottage cheese:			
Pound bulk	.13	.17	
Cartons or jars, 10 ounces or less	.09	.11	.11
Nonreturnable glass, 10 ounces or less	.10	.12	.12

SCHEDULE IV

SAN BERNARDINO SALES DISTRICT

The San Bernardino Sales District includes all portions of Riverside and San Bernardino counties which are within the Los Angeles Sales Area as described in Paragraph D of this agreement, together with such towns and rural districts in Los Angeles County as are in whole or in part within a seven mile radius, measured from the city hall of Pomona, California.

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 1 of Exhibit A and revised base is in effect:

	Wholesale prices	Store selling prices	Home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$2. 50		
3-gallon cans	. 80		
2-gallon cans	. 55		
1-gallon cans	. 30		
Quarts	. 08	$0. 10	$0. 10
Pints	. 06	. 07	. 07
Third quarts	. 04		
Half pints	. 03½		
Gallons, bulk [1]	. 35		
Guaranteed milk:			
Quarts	. 11	. 13	. 13
Pints	. 07	. 08	. 08
Raw milk, certified:			
Quarts	. 13	. 15	. 15
Pints	. 08	. 10	. 10
Third quarts	. 06		
Half pints	. 05		
Chocolate drink: Quarts	. 08	. 10	. 10
Table cream, 25 percent:			
3-gallon cans	2. 90		
2-gallon cans	1. 95		
Quarts	. 30	. 36	. 36
Pints	. 17	. 25	. 25
Half pints	. 11	. 14	. 14
Whipping cream, 38 percent:			
3-gallon cans	4. 65		
2-gallon cans	3. 10		
Quarts	. 40	. 60	. 60
Pints	. 27	. 37	. 37
Half pints	. 15	. 20	. 20
Sour cream:			
Gallons	1. 00		
Half pints	. 08	. 11	. 11
Churned buttermilk:			
10-gallon cans	2. 00		
3-gallon cans	. 75		
2-gallon cans	. 50		
1-gallon cans	. 30		
Quarts	. 08	. 10	. 10
Third quarts	. 04		
Half pints	. 03½		

[1] This price applies only to bulk milk sold on cash and carry basis at creamery or dairy.

	Wholesale prices	Store selling prices	Home delivered prices
Skim milk:			
10-gallon cans	$1.40	----------	----------
3-gallon cans	.45	----------	----------
2-gallon cans	.32	----------	----------
1-gallon cans	.16	----------	----------
Quarts	.06	----------	$0.08
Creamed cottage cheese:			
Pounds, bulk	.11	$0.15	----------
Cartons or jars, 10 ounces or less	.08	.10	.10
Glass, 10 ounces or less	.09	.11	.11

NOTE.—Prices for Beaumont, Banning, Palm Springs, Indio, and Coachella; prices for Arrowhead, Big Bear, Crestline, and other mountain resorts, use wholesale prices plus motor freight schedule; Interprice to licensed dairies, a 10-percent reduction from all wholesale prices will be made.

The prices listed below will apply for Beaumont, Banning, Palm Springs, Coachella, and Indio:

	Wholesale prices	Minimum store selling prices	Minimum home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$3.00	----------	----------
3-gallon cans	1.00	----------	----------
2-gallon cans	.65	----------	----------
1-gallon cans	.35	----------	----------
Quarts	.11	$0.14	$0.14
Pints	.06	.08	.08
Third quarts	.04	----------	----------
Half pints	.03½	----------	----------
Guaranteed milk:			
Quarts	.14	.17	.17
Half pints	.04	.06	.06
Certified milk:			
Quarts	.18	.23	.23
Pints	.10	.13	.13
Half pints	.05	.07	.07
Chocolate drink: Quarts	.09	.12	.12
Table cream, 25 percent:			
3-gallon cans	3.40	----------	----------
2-gallon cans	2.35	----------	----------
Quarts	.37	.43	.43
Pints	.21	.29	.29
Half pints	.13	.16	.16
Whipping cream, 38 percent:			
3-gallon cans	5.00	----------	----------
2-gallon cans	3.50	----------	----------
Quarts	.58	.70	.70
Pints	.38	.42	.42
Half pints	.18	.23	.23
Buttermilk, churned:			
10-gallon cans	2.75	----------	----------
Gallons	.35	----------	----------
Quarts	.10	.12	.12
Skim milk:			
10 gallons or more	1.75	----------	----------
Gallons	.20	----------	----------
Quarts	.07	.09	.09
Creamed cottage cheese:			
Pounds, bulk	.13	.17	----------
Cartons or jars, 10 ounces or less	.10	.12	.12
Nonreturnable glass, 10 ounces or less	.11	.13	.13

SCHEDULE V

San Bernardino District

The San Bernardino District includes all portions of Riverside and San Bernardino counties which are within the Los Angeles Sales Area as described in Paragraph D of this Agreement, together with such towns and rural districts in Los Angeles County as are wholly or in part within a seven-mile radius, measured from the city hall of Pomona, California.

The following minimum wholesale, resale and retail prices shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 2 of Exhibit A and revised base is in effect:

	Wholesale prices	Store selling prices	Home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$2.85		
3-gallon cans	.90		
2-gallon cans	.65		
1-gallon cans	.34		
Quarts	.09	$0.11	$0.11
Pints	.07	.08	.08
Third quarts	.04½		
Half pints	.03½		
Gallons, bulk [1]	.40		
Guaranteed milk:			
Quarts	.12	.14	.14
Pints	.08	.09	.09
Raw milk certified:			
Quarts	.14	.16	.16
Pints	.09	.11	.11
Third quarts	.06½		
Half pints	.05½		
Chocolate drink: Quarts	.09	.11	.11
Table cream, 25 percent:			
3-gallon cans	3.10		
2-gallon cans	2.10		
Quarts	.33	.40	.40
Pints	.19	.27	.27
Half pints	.12	.15	.15
Whipping cream, 38 percent:			
3-gallon cans	5.50		
2-gallon cans	3.65		
Quarts	.48	.68	.68
Pints	.30	.40	.40
Half pints	.17	.22	.22
Sour cream:			
Gallons	1.10		
Half pints	.09	.12	.12
Churned buttermilk:			
10-gallon cans	2.40		
3-gallon cans	.85		
2-gallon cans	.60		
1-gallon cans	.34		
Quarts	.09	.11	.11
Third quarts	.04½		
Half pints	.03½		

[1] This price applied only to bulk milk sold on cash-and-carry basis at creamery or dairy.

	Wholesale prices	Store selling prices	Home delivered prices
Skim milk:			
10-gallon cans	$1. 50		
3-gallon cans	. 55		
2-gallon cans	. 40		
1-gallon cans	. 20		
Quarts	. 07		$0. 09
Creamed cottage cheese:			
Pounds, bulk	. 12	$0. 16	
Cartons or jars, 10 ounces or less	. 09	. 11	. 11
Nonreturnable glass, 10 ounces or less	. 10	. 12	. 12

Prices for Arrowhead, Big Bear, Crestline and other mountain resorts, use wholesale prices plus Motor Transit Freight Schedule; interprice to licensed dairies, a 10 percent reduction from all wholesale prices will be made.

The prices listed below will apply for Beaumont, Banning, Palm Springs, Coachella, and Indio:

	Wholesale prices	Store selling prices	Home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$3. 50		
3-gallon cans	1. 05		
2-gallon cans	. 70		
1-gallon cans	. 40		
Quarts	. 12	$0. 15	$0. 15
Pints	. 07	. 09	. 09
Third quarts	. 05		
Half pints	. 04		
Guaranteed milk:			
Quarts	. 15	. 18	. 18
Half pints	. 05	. 07	. 07
Certified milk:			
Quarts	. 20	. 25	. 25
Pints	. 12	. 15	. 15
Half pints	. 06	. 07	. 07
Chocolate drink: quarts	. 10	. 13	. 13
Table Cream, 25 percent:			
3-gallon cans	4. 50		
2-gallon cans	3. 00		
Quarts	. 50	. 60	. 60
Pints	. 30	. 40	. 40
Half pints	. 17	. 22	. 22
Whipping cream, 38 percent:			
3-gallon cans	5. 50		
2-gallon cans	4. 00		
Quarts	. 80	. 90	. 90
Pints	. 45	. 50	. 50
Half pints	. 25	. 30	. 30
Buttermilk, churned:			
10-gallon cans	3. 50		
Gallons	. 40		
Quarts	. 12	. 14	. 14
Skim milk:			
10 gallons	2. 00		
Gallons	. 25		
Quarts	. 10	. 10	. 10
Creamed cottage cheese:			
Pounds, bulk	. 14	. 18	
Cartons or jars, 10 ounces or less	. 11	. 13	. 13
Nonreturnable glass, 10 ounces or less	. 12	. 14	. 14

SCHEDULE VI

San Bernardino District

The San Bernardino Sales District includes all portions of Riverside and San Bernardino counties which are within the Los Angeles Sales Area as described in Paragraph D of this Agreement, together with such towns and rural districts in Los Angeles County as are wholly or in part within a seven-mile radius, measured from the city hall of Pomona, California.

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92-score butter is such that Section 3 of Exhibit A and revised base is in effect:

	Wholesale prices	Minimum store selling prices	Minimum home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$3.15	----------	----------
3-gallon cans	1.00	----------	----------
2-gallon cans	.72	----------	----------
1-gallon cans	.38	----------	----------
Quarts	.10	$0.12	$0.12
Pints	.07	.09	.09
Third quarts	.05	----------	----------
Half pints	.04	----------	----------
Gallon, bulk [1]	.44	----------	----------
Guaranteed milk:			
Quarts	.13	.15	.15
Pints	.08	.10	.10
Raw milk, certified:			
Quarts	.15	.17	.17
Pints	.10	.12	.12
Third quarts	.07	----------	----------
Half pints	.06	----------	----------
Chocolate milk: Quarts	.10	.12	.12
Table cream, 25 percent:			
3-gallon cans	4.00	----------	----------
2-gallon cans	2.70	----------	----------
Quarts	.40	.50	.50
Pints	.21	.29	.29
Half pints	.13	.16	.16
Whipping cream, 38 percent:			
3-gallon cans	6.20	----------	----------
2-gallon cans	4.10	----------	----------
Quarts	.53	.73	.73
Pints	.36	.46	.46
Half pints	.19	.24	.24
Sour cream:			
Gallons	1.25	----------	----------
Half pints	.10	.13	.13
Churned buttermilk:			
10-gallon cans	2.70	----------	----------
3-gallon cans	.95	----------	----------
2-gallon cans	.70	----------	----------
1-gallon cans	.38	----------	----------
Quarts	.10	.12	.12
Third quarts	.05	----------	----------
Half pints	.04	----------	----------

[1] This price applies only to bulk milk sold on cash-and-carry basis at creamery or dairy.

	Wholesale prices	Minimum store selling prices	Minimum home delivered prices
Skim milk:			
10-gallon cans	$1. 80	----------	----------
3-gallon cans	. 65	----------	----------
2-gallon cans	. 48	----------	----------
1-gallon cans	. 25	----------	----------
Quarts	. 08	$0. 10	$0. 10
Creamed cottage cheese:			
Pounds, bulk	. 13	. 17	----------
Cartons or jars, 10 ounces or less	. 09	. 11	. 11
Nonreturnable glass, 10 ounces or less	. 10	. 12	. 12

Interprice licensed dairies, a 10% reduction will be made from all listed wholesale prices.
Mountain resorts and Desert areas add to all milk, Motor Transit Freight.

The prices listed below will apply for Beaumont, Banning, Palm Springs, Coachella, and Indio.

	Wholesale prices	Minimum store selling prices	Minimum home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$3. 85	----------	----------
3-gallon cans	1. 35	----------	----------
2-gallon cans	. 77	----------	----------
1-gallon cans	. 44	----------	----------
Quarts	. 13	$0. 16	$0. 16
Pints	. 07	. 09	. 09
Third quarts	. 05	----------	----------
Half pints	. 04	----------	----------
Guaranteed milk:			
Quarts	. 15	. 18	. 18
Pints	. 08	. 10	. 10
Half pints	. 05	. 07	. 07
Certified milk:			
Quarts	. 20	. 25	. 25
Pints	. 12	. 15	. 15
Half pints	. 06	. 07	. 07
Chocolate drink: Quarts	. 10	. 13	. 13
Table cream, 25 percent:			
3-gallon cans	4. 50	----------	----------
2-gallon cans	3. 00	----------	----------
Quarts	. 50	. 60	. 60
Pints	. 30	. 40	. 40
Half pints	. 17	. 22	. 22
Whipping cream, 38 percent:			
3-gallon cans	5. 50	----------	----------
2-gallon cans	4. 00	----------	----------
Quarts	. 80	. 90	. 90
Pints	. 45	. 50	. 50
Half pints	. 25	. 30	. 30
Buttermilk, churned:			
10-gallon cans	3. 50	----------	----------
Gallons	. 40	----------	----------
Quarts	. 12	. 14	. 14
Skim milk:			
10 gallons or more	2. 00	----------	----------
Gallons	. 25	----------	----------
Quarts	. 08	. 10	. 10
Creamed cottage cheese:			
Pounds, bulk	. 14	. 18	----------
Cartons or jars, 10 ounces or less	. 11	. 13	. 13
Nonreturnable glass, 10 ounces or less	. 12	. 14	. 14

SCHEDULE VII

ORANGE COUNTY DISTRICT (10 CENTS PER QUART, RETAIL)

The Orange County Sales District includes all communities in Orange County.

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 1 of Exhibit A and revised base is in effect.

	Wholesale prices	Store selling prices	Home delivered prices
Milk, grade A pasteurized:			
10-gallon cans	$2. 50		
3-gallon cans	. 85		
2-gallon cans	. 60		
1-gallon cans	. 32		
Quarts	. 08	$0. 10	$0. 10
Pints	. 06	. 07	. 07
Third quarts	. 04		
Half pints	. 03		
Raw milk, grade A:			
Quarts	. 08	. 10	. 10
Pints	. 06	. 07	. 07
Third quarts	. 04		
Half pints	. 03		
Guaranteed milk:			
Quarts	. 11	. 13	. 13
Pints	. 08	. 09	. 09
Raw milk, certified:			
Quarts	. 18	. 20	. 20
Pints	. 11	. 12	. 12
Third quarts	. 05		
Half pints	. 04		
Chocolate drink: Quarts	. 08	. 10	. 10
Table cream, 27 percent:			
3-gallon cans	3. 15		
2-gallon cans	2. 10		
Quarts	. 28	. 40	. 40
Half pints	. 11	. 14	. 14
Whipping cream, 38 percent:			
3-gallon cans	4. 65		
2-gallon cans	3. 10		
Quarts	. 40	. 60	. 60
Half pints	. 17	. 20	. 20
Sour cream:			
Gallon cans	1. 00		
Half pints	. 09	. 11	. 11
Churned buttermilk:			
10-gallon cans	$2. 00		
3-gallon cans	. 85		
2-gallon cans	. 60		
1-gallon cans	. 32		
Quarts	. 08	. 10	. 10
Third quarts	. 04		
Half pints	. 03		
Skim milk:			
10-gallon cans	1. 30		
3-gallon cans	. 45		
2-gallon cans	. 30		
1-gallon cans	. 15		
Quarts	. 06	. 07	. 07
Creamed cottage cheese:			
Pounds, bulk	. 11	. 15	
Cartons or jars, 10 ounces or less	. 08	. 10	. 10
Nonreturnable glass, 10 ounces or less	. 09	. 11	. 11
16-ounce returnable glass	. 13	. 15	. 15

SCHEDULE VIII

Orange County Sales District

The Orange County Sales District includes all communities in Orange County.

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 2 of Exhibit A and revised base is in effect.

	Wholesale prices	Store selling prices	Home delivered prices
Milk, grade A, pasteurized:			
10-gallon cans	$2.85	----------	----------
3-gallon cans	.95	----------	----------
2-gallon cans	.70	----------	----------
1-gallon cans	.36	----------	----------
Quarts	.09	$0.11	$0.11
Pints	.07	.08	.08
Third quarts	.04½	----------	----------
Half pints	.03½	----------	----------
Raw milk, grade A:			
Quarts	.09	.11	.11
Pints	.07	.08	.08
Third quarts	.04½	----------	----------
Half pints	.03½	----------	----------
Guaranteed milk:			
Quarts	.12	.14	.14
Pints	.09	.10	.10
Raw milk, certified:			
Quarts	.18	.20	.20
Pints	.11	.12	.12
Third quarts	.05½	----------	----------
Half pints	.04½	----------	----------
Chocolate drink: Quarts	.09	.11	.11
Table cream, 27 percent:			
3-gallon cans	3.65	----------	----------
2-gallon cans	2.50	----------	----------
Quarts	.45	.50	.50
Half pints	.13	.15	.15
Whipping cream, 38 percent:			
3-gallon cans	5.50	----------	----------
2-gallon cans	3.65	----------	----------
Quarts	.58	.68	.68
Half pints	.19	.22	.22
Sour cream:			
Gallon	1.10	----------	----------
Half pints	.10	.12	.12
Churned buttermilk:			
10-gallon cans	2.40	----------	----------
3-gallon cans	.95	----------	----------
2-gallon cans	.70	----------	----------
1-gallon cans	.36	----------	----------
Quarts	.09	.11	.11
Third quarts	.04½	----------	----------
Half pints	.03½	----------	----------
Skim milk:			
10-gallon cans	1.50	----------	----------
3-gallon cans	.55	----------	----------
2-gallon cans	.38	----------	----------
1-gallon cans	.20	----------	----------
Quarts	.07	.08	.08
Creamed cottage cheese:			
Pounds, bulk	.12	.16	----------
Cartons or jars, 10 ounces or less	.09	.11	.11
Nonreturnable glass, 10 ounces or less	.10	.12	.12
16-ounce returnable	.14	.16	.16

SCHEDULE IX

Orange County Sales District

The Orange County Sales District includes all communities in Orange County.

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 3 of Exhibit A and revised base is in effect:

	Wholesale prices	Store selling prices	Home delivered prices
Milk, Grade A, pasteurized:			
10-gallon cans	$3.20	----------	----------
3-gallon cans	1.05	----------	----------
2-gallon cans	.80	----------	----------
1-gallon cans	.40	----------	----------
Quarts	.10	$0.12	$0.12
Pints	.08	.09	.09
Third quarts	.06	----------	----------
Half pints	.04	----------	----------
Raw milk, Grade A:			
Quarts	.10	.12	.12
Pints	.08	.09	.09
Third quarts	.05	----------	----------
Half pints	.04	----------	----------
Guaranteed milk:			
Quarts	.13	.15	.15
Pints	.10	.11	.11
Raw milk, certified:			
Quarts	.19	.21	.21
Pints	.12	.13	.13
Third quarts	.06	----------	----------
Half pints	.05	----------	----------
Chocolate drink, quarts	.10	.12	.12
Table cream, 27 percent:			
3-gallon cans	4.10	----------	----------
2-gallon cans	2.80	----------	----------
Quarts	.50	.55	.55
Half pints	.14	.16	.16
Whipping cream, 38 percent:			
3-gallon cans	6.20	----------	----------
2-gallon cans	4.50	----------	----------
Quarts	.66	.76	.76
Half pints	.21	.24	.24
Sour cream:			
Gallon	1.20	----------	----------
Half pints	.11	.13	.13
Churned buttermilk:			
10-gallon cans	2.80	----------	----------
3-gallon cans	1.05	----------	----------
2-gallon cans	.80	----------	----------
1-gallon cans	.40	----------	----------
Quarts	.10	.12	.12
Third quarts	.05	----------	----------
Half pints	.04	----------	----------
Skim milk:			
10-gallon cans	1.70	----------	----------
3-gallon cans	.65	----------	----------
2-gallon cans	.46	----------	----------
1-gallon cans	.25	----------	----------
Quarts	.08	.09	.09
Creamed cottage cheese:			
Pounds, bulk	.13	.17	----------
Cartons or jars, 10 ounces or less	.09	.11	.11
Nonreturnable glass, 10 ounces or less	.10	.12	.12
16-ounce returnable jars	.15	.17	.17

SCHEDULE X

Cottage Cheese and Churned Buttermilk Rules, Regulations, and Prices

1. The following rules, regulations, and price schedules apply to the Los Angeles, San Bernardino, and Orange Districts, except Beaumont, Banning, Palm Springs, Coachella, and Indio in the San Bernardino Sales Districts. There shall be added to the prices in this schedule in the case of mountain resorts and desert areas in the San Bernardino District the motor transit freight rate as established by the California Railroad Commission, irrespective of the actual mode of delivery.

QUANTITY DISCOUNTS

2. (*a*) The wholesale prices of churned buttermilk in 10-gallon cans set forth in Schedules B (1) to B (9), inclusive, of this exhibit shall be subject to the following quantity discount: When a customer buys more than twelve 10-gallon cans per week, there shall be a discount of ten percent on the wholesale price of 10-gallon cans set forth in said schedules. All sales to customers shall be invoiced at the full wholesale price. At the end of each month credit shall be granted to those customers whose purchases are such as entitle them to the foregoing discount for discount so earned.

(*b*) The wholesale prices of bulk creamed cottage cheese set forth in Schedules B (1) to B (9), inclusive, of this Exhibit shall be subject to the following quantity discounts: When a customer buys more than 250 pounds and not in excess of 1,250 pounds per month, there shall be a discount of one cent per pound. When a customer buys in excess of 1,250 pounds per month, there shall be a discount of two cents a pound. All sales to customers shall be invoiced net without discount. At the end of each month, credit shall be granted to those customers whose purchases are such as entitle them to the foregoing discounts for discounts so earned.

(*c*) When a customer is purchasing a quantity of bulk creamed cottage cheese and/or churned buttermilk from two or more distributors which if purchased from a single distributor would entitle him to either or both of the foregoing quantity discounts, he shall be entitled to such discounts from each of such distributors pro rata to the quantities received from each such distributor.

DRY COTTAGE CHEESE

3. The minimum prices for dry cottage cheese, including therein dry curd, special mix, and hoop cheese, shall be as follows:

	Wholesale	Resale
When Section 1 and revised base prevail	$0.08	$0.10
When Section 2 and revised base prevail	.09	[1].11
When Section 3 and revised base prevail	.10	[1].12

[1] Resale prices for hoop cheese shall be two cents more than the corresponding resale prices applicable to dry curd and special mix.

SCHEDULE XI

Cream Jobbing Price Schedule

The following schedule of minimum prices apply to sales by cream jobbers to persons (1) who are engaged principally in the distribution of milk and its products, and (2) who have a "creamery operator's" factory license issued by the Department of Agriculture of the State of California. Such schedule shall be in effect when the Los Angeles Market quotation of 92-score butter is such that Section 1 of Exhibit A and revised base is in effect:

CHURNING CREAM

For each pound of butterfat contained therein add 8¢ to the Los Angeles Market quotation for 92-score butter effective for the day of delivery.

GRADE A CREAM IN TEN-GALLON CANS

For each pound of butterfat contained therein add to the Los Angeles Market quotation for 92-score butter effective for the date of delivery.

	In weekly quantities of—		
	1–14 cans	15–34 cans	35 cans or over
Raw cream, 38–40 percent	$0. 17	$0. 16	$0. 15
Pasteurized cream, 38–40 percent	. 19	. 18	. 17
Raw cream, standardized to other butterfat percentages	. 19	. 18	. 17
Pasteurized cream, standardized to other butterfat percentages	. 20	. 19	. 18

SKIM MILK (IN BULK, PER GALLON)

Condensed:	
10 gallons or more in a single delivery	$0. 25
Deliveries of less than 10 gallons	. 30
Not condensed:	
10 gallons or more in a single delivery	. 07
Deliveries of less than 10 gallons	Wholesale prices apply

SCHEDULE XII

Cream Jobbing Price Schedule

The following schedule of minimum prices apply to sales by cream jobbers to persons (1) who are engaged principally in the distribution of milk and its products and (2) who have a "creamery operator's" factory license issued by the Department of Agriculture of the State of California. Such schedule shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 2 of Exhibit A and revised base is in effect.

CHURNING CREAM

For each pound of butterfat contained therein add 10¢ to the Los Angeles Market quotation for 92 score butter effective for the day of delivery.

GRADE A CREAM IN TEN GALLON CANS

For each pound of butterfat contained therein add to the Los Angeles Market quotation for 92 score butter effective for the date of delivery.

	In weekly quantities of—		
	1–14 cans	15–34 cans	35 cans or over
Raw cream, 38–40 percent	$0. 20	$0. 19	$0. 18
Pasteurized cream, 38–40 percent	. 22	. 21	. 20
Raw cream standardized to other butterfat percentages	. 22	. 21	. 20
Pasteurized cream standardized to other butterfat percentages	. 23	. 22	. 21

SKIM MILK (IN BULK, PER GALLON)

Condensed:	
10 gallons or more in a single delivery	$0. 30
Deliveries of less than 10 gallons	. 35
Not condensed:	
10 gallons or more in a single delivery	. 08
Deliveries of less than 10 gallons	Wholesale prices apply

SCHEDULE XIII

Cream Jobbing Price Schedule

The following schedules of minimum prices apply to sales by cream jobbers to persons (1) who are engaged principally in the distribution of milk and its products and (2) who have a "creamery operator's" factory license issued by the Department of Agriculture of the State of California. Such schedules shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 3 of Exhibit A and revised base is in effect.

Churning Cream

For each pound of butterfat contained therein add 10¢ to the Los Angeles Market quotation for 92 score butter effective for the day of delivery.

Grade A Cream in Ten Gallon Cans

For each pound of butterfat contained therein add to the Los Angeles Market quotation for 92 score butter effective for the date of delivery.

	In weekly quantities of—		
	1–14 cans	15–34 cans	35 cans or over
Raw cream, 38–40 percent	$0. 24	$0. 23	$0. 22
Pasteurized cream, 38–40 percent	. 26	. 25	. 24
Raw cream standardized to other butterfat percentages	. 26	. 25	. 24
Pasteurized cream standardized to other butterfat percentages	. 27	. 26	. 25

SKIM MILK (IN BULK, PER GALLON)

Condensed:	
10 gallons or more in a single delivery	$0. 32
Deliveries of less than 10 gallons	. 37
Not condensed:	
10 gallons or more in a single delivery	. 09
Deliveries of less than 10 gallons	Wholesale prices apply

SCHEDULE XIV

Prices to Peddlers for Resale

The following minimum prices f.o.b. place of bottling or other packaging shall be charged to peddlers who buy for resale:

	When Sec. 1 of Ex. A and revised base is in effect	When Sec. 2 of Ex. A and revised base is in effect	When Sec. 3 of Ex. A and revised base is in effect
Pasteurized Grade A milk:			
3-gallons	$0. 70	$0. 80	$0. 90
2-gallons	. 45	. 55	. 62
1-gallon	. 24	. 28	. 32
Quarts	. 06	. 07	. 08
Pints	. 03	. 04	. 05
Third quarts	. 02½	. 03½	. 04
Half pints	. 02	. 02½	. 03
Grade A raw milk:			
Quarts	. 06	. 07	. 08
Pints	. 03	. 04	. 05
Third quarts	. 02½	. 03½	. 04
Half pints	. 02	. 02½	. 03
Chocolate drink:			
Quarts	. 06	. 07	. 08
Pints	. 03	. 04	. 05
Third quarts	. 02½	. 03½	. 04
Half pints	. 02	. 02½	. 03
Churned buttermilk:			
3-gallons	. 70	. 80	. 90
2-gallons	. 45	. 55	. 65
1-gallon	. 24	. 28	. 32
Quarts	. 06	. 07	. 08
Pints	. 03½	. 04	. 04½
Third quarts	. 03	. 03½	. 04
Half pints	. 02	. 02½	. 03
Guaranteed milk:			
Quarts	. 09	. 10	. 11
Pints	. 05	. 06	. 07

	When Sec. 1 of Ex. A and revised base is in effect	When Sec. 2 of Ex. A and revised base is in effect	When Sec. 3 of Ex. A and revised base is in effect
Certified milk, raw:			
Quarts	$0. 11	$0. 12	$0. 13
Pints	. 07	. 08	. 09
Coffee cream, 22 percent:			
Quarts	. 23	. 28	. 32
Pints	. 14	. 16	. 18
Half pints	. 07	. 08	. 09
Table cream, 27 percent:			
Quarts	. 27	. 32	. 39
Pints	. 16	. 18	. 20
Half pints	. 09	. 10	. 11
Whipping cream, 38 percent:			
Quarts	. 37	. 45	. 50
Pints	. 22	. 25	. 31
Half pints	. 13	. 15	. 17
Sour cream: Half pints	. 07	. 08	. 09
Creamed cottage cheese: Glass, 10 ounces or less	. 09	. 10	. 10
Skim milk: 1 gallon	. 11	. 15	. 20

EXHIBIT C

RULES FOR CONTROL OF PRODUCTION AND ESTABLISHMENT OF SURPLUS PRICE TO PRODUCERS OF GRADE A MARKET MILK

Rules for control of production.—The following rules shall be applicable to all producers of Grade A Market Milk.

1. The term "production base period" as used herein means the period March 16, 1933 to June 15, 1933, both dates inclusive.

2. The term "deliveries" as used herein means any or all of the following:

(*a*) Milk shipped by any producer to any distributor of Grade A Market Milk.

(*b*) Milk shipped by a producer to the surplus plant of Producers Arbitration Committee, Inc.

(*c*) Milk sold by a producer as a distributor either as Grade A Market Milk or as fluid cream or both.

3. The term "market percentage" means the percentage arrived at by dividing the daily average of the total deliveries of all producers who shipped milk during the production base period into the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area during the month of June 1933 as determined by Los Angeles Milk Industry Board.

4. *General bases.*—The established base of each such producer marketing milk in the Los Angeles Sales Area on the effective date of this Agreement who was marketing milk during the entire production base period shall be arrived at as follows: Determine the average daily deliveries of each such producer during the production base period and apply the market percentage thereto. The resulting figure will be the established base of each such producer.

5. *Bases for producers starting deliveries after March 16 but on or before June 15, 1933.*—The established base of each such producer now marketing milk in the Los Angeles Sales Area who commenced to market milk after March 16, 1933, but on or prior to June 15, 1933, shall be arrived at as follows:

A. If any such producer so elects, his deliveries during the portion of the production base period in which he was marketing milk in the Los Angeles Sales Area may be treated as if such deliveries were his total deliveries during the full production base period. Determine the total deliveries of such producer and divide the same by 92, and apply the market percentage against the daily average quantity thus arrived at. The resulting quantity shall be the established base of each such producer.

B. If such producer does not elect to have his base established as provided in paragraph A above, then determine the total deliveries of such producer during a period of 92 days beginning with the date on which he commenced to market milk in the Los Angeles Sales Area and divide such total by 184. The resulting figure will be the established base of such producer.

6. *Bases of producers starting on and after June 16, 1933.*—The established base of each producer now marketing milk in the Los Angeles Sales Area who did not commence to market milk in the Los Angeles Sales Area on or prior to June 15, 1933, or who commences to market milk after the effective date of this Agreement shall be arrived at as follows: Determine the deliveries of such producer during a period of 92 days beginning with the date on which he begins to market milk in the Los Angeles Sales Area and divide the total of such deliveries by 368. The resulting figure will be the established base of such producer. In the case of any such producer whose established base cannot be determined fully as of the last day of any month beginning with the month of October 1933, a temporary established base pending the completion of 92 days of deliveries shall be determined in respect of each calendar month by determining the total deliveries of each producer for the period beginning with the date on which he commenced to market milk in the Los Angeles Sales Area and ending with the last day of such calendar month and dividing such total by four times the number of days included in such period. Such temporary base shall, for all purposes of this agreement be considered the established base of such producers in respect of any such monthly accounting period.

7. *Adjustments of bases to deliveries.*—Any producer whose daily deliveries for any three consecutive months excluding months prior to the month of November 1933 is less than 90% of his established base will thereby establish a new base according to his average daily deliveries during such three month period. The application of this paragraph shall be subject to the provisions of paragraph 9.

8. *"Sales of bases."*—Sales of bases are allowed only in conjunction with the sale of cows and may be apportioned between the buyer and seller in accordance with the number of cows which the buyer has purchased and the number of cows which the seller has retained unsold. The buyer and the seller shall, in case of voluntary sale, jointly sign a statement in writing showing the amount of bases transferred to the buyer and retained by the seller, respectively, which writing shall be filed with the Producers' Arbitration Committee, Inc., within five days from the date of sale. Bases acquired by purchase of cows may be added to existing bases if any exist.

9. *Effect of fire, etc.*—The established base shall remain in effect for a period of three months following the initial test for tuberculosis or for contagious abortion by County, State or Federal authorities, the loss of barn or herd, or both, by fire or Act of God. The established base shall be retained for a period of 45 days in case deliveries of Grade A Market Milk are shut off or excluded by order of any Board of Health having jurisdiction in the premises and in case of quarantine.

ESTABLISHMENT OF ADJUSTED BASE PRICE

1. Producers' Arbitration Committee, Inc., is operating and will continue to operate a surplus plant to which is delivered all milk from producers in the Los Angeles Milk Shed having established bases in excess of the requirements of contracting distributors in the Los Angeles Sales Area for distribution as fluid milk in said area. Such surplus plant will have the following sources of receipts:

(*a*) The net proceeds arising from the sale of butter and powdered skimmed milk which has been manufactured by it from the butter fat and skimmed milk derived from milk delivered to the surplus plant. (Such net proceeds shall be the gross proceeds less the reasonable cost of operation of the surplus plant and less such amount as the Producers' Arbitration Committee, Inc., shall retain as working capital for the operation of the plant.)

(*b*) The proceeds of such milk delivered to it which it may have, under authority of Producers' Arbitration Committee, Inc., sold in time of shortage to contracting distributors in the Los Angeles Sales Area.

(*c*) The difference between the full base price and the surplus price as determined in accordance with the provisions of Exhibit A, Schedule I, and Exhibit A, Schedule III, which is payable under the provisions of Paragraphs 5 (*a*), 5 (*b*), and 5 (*c*), of this agreement.

2. The surplus plant will be accountable to producers delivering milk to it for the full base price in respect of deliveries not in excess of the individual producer's base, and the surplus price in respect of deliveries in excess of each producer's base. The total of the amounts so to be accounted for shall be computed and from the result of such computation shall be deducted the receipts from the operation of the surplus plant determined in the manner provided in the preceding paragraph. The difference will be the loss to the surplus plant resulting from its operations, to be charged against all deliveries of base milk whether to the surplus plant or to the contracting distributors.

3. The amount of the loss, determined as aforesaid, shall be divided by the total of all delivered base, expressed in terms of pounds of butterfat, whether to contracting distributors or to the surplus plant, the resulting figures being the amount per pound of butter fat which it is necessary to charge back against delivered bases of all producers in order to obtain the adjusted base price.

4. The difference between the full base price determined according to the provisions of Exhibit A, Schedule I, and Exhibit A, Schedule III, and the aforesaid loss per pound of butterfat determined as in the preceding paragraph, shall be the adjusted base price to be paid to all producers, whether delivering to contracting distributors or to the surplus plant, for deliveries not in excess of their respective bases.

5. The difference between the base price and the adjusted base price in respect of the base milk of all producers delivering to contracting distributors, which difference is payable to Producers' Arbitration Committee, Inc., in accordance with the provisions of paragraph 5 of this Agreement when added to the similar deduction made directly by the surplus plant in respect of the base milk of all producers delivering to the surplus plant, results in a uniform adjusted base price for deliveries not in excess of base quantities of all producers.

6. Producers' Arbitration Committee, Inc., shall secure the necessary data from the contracting distributors and from the surplus plant, shall compute the foregoing adjustments each month, shall submit a statement containing such adjustments to the Los Angeles Milk Industry Board for its approval, and upon its approval shall notify distributors and producers as to the payments to be made by them, respectively, in accordance with the foregoing principles. It shall also cause to be paid the adjusted base price and/or surplus price to producers delivering base milk and/or surplus milk to the surplus plant.

7. Any sums deducted by the Producers' Arbitration Committee, Inc., and retained as working capital for the operation of the plant as provided in paragraph 1 of this Exhibit C shall be set up on the books of the Producers' Arbitration Committee, Inc., as a separate fund to the credit of each producer from whom such funds were deducted; and in case of liquidation of Producers' Arbitration Committee, Inc., or discontinuance of business by contributing producers there shall be paid back to each producer the proportion of the total net worth of the Association which his contribution is to the total of all sums so contributed. Producers' Arbitration Committee, Inc., shall develop and make effective a financing plan, with approval of the Los Angeles Milk Industry Board, to cover such deductions for working capital under which monthly deductions and total accumulations will meet the capital needs of the Producers' Arbitration Committee, Inc., without accumulation of unnecessary sums.

8. Producers' Arbitration Committee, Inc., may make such regulations as may be necessary to carry out the operations of the surplus plant and adjustment of prices to producers in accordance with the foregoing principles, such regulations to be subject to the approval of the Los Angeles Milk Industry Board and the Secretary.

9. In the event the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area becomes so decreased or increased as to render impractical, in the opinion of the Los Angeles Milk Industry Board, the accounting for such variations through adjustments in the base price said producers as provided in paragraph 4, Schedule "C", the Producers' Arbitration Committee, Inc., shall with the approval of the Los Angeles Milk Industry Board and the Secretary, make such uniform increases or decreases, as the case may be, in all existing established bases of producers, as will cause the sum total of all bases adjusted as aforesaid, to again approximate in amount the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area.

EXHIBIT D

LOS ANGELES MILK INDUSTRY BOARD

1. The Los Angeles Milk Industry Board shall be composed of thirteen members all of whose appointments shall be subject to the approval of the Secretary, to wit:

(*a*) Six producers. Five of these shall be selected by the Producers' Arbitration Committee, Inc. (One from each of the following five member associations: California Milk Producers' Association, Independent Milk Producers' Association, Los Angeles County Natural Milk Producers' Association, Los Angeles Mutual Dairymen's Association, Southern California Bottled Raw Milk Association.) The sixth producer shall be selected by producers not members of the five associations of producers mentioned above, provided, however, that if such producers have not selected a member within five days after the effective date of this Agreement, Producers' Arbitration Committee, Inc., shall select such sixth member from among producers not members of any of the aforementioned five associations.

(*b*) Six distributors. Four of these shall be selected by the Southern California Milk Dealers Association. One of these shall be selected by the Independent Milk Distributors Association, Inc. The sixth distributor shall be selected by distributors not members of either of said associations; provided, however, that if such distributors shall not have selected a member within five days after the effective date of this Agreement, the five distributor members selected as above provided shall select such sixth member.

(*c*) The thirteenth member shall be selected by two-thirds vote of the twelve selected as specified in (*a*) and (*b*) above and such thirteenth member shall be the Chairman of the Board.

2. The duties of the Los Angeles Milk Industry Board in addition to those specifically set forth elsewhere in this Agreement shall be to compile statistics and make surveys of costs and methods of production and distribution in the Los Angeles market, either alone or in collaboration with other agencies engaged in similar projects; to formulate a program for improving the quality of milk and the standards of the Industry generally in the Los Angeles market; to arbitrate disputes and to engage in advertising and sales-promotion work which will further the interests of the industry.

(*a*) Subject to the approval of the Secretary, the Los Angeles Milk Industry Board may make such further rules, regulations and/or arrangements, not inconsistent with this Agreement or with those which have been established by the Secretary, as may be necessary to carry out the plans and principles set forth in this Agreement.

3. In the exercise of any powers or duties under this Agreement:

(*a*) The Los Angeles Milk Industry Board shall not be liable for any damages caused by any acts or omissions of its members, whether acting individually or collectively as a Board.

(*b*) No member of Los Angeles Milk Industry Board shall be liable for any damages caused by the acts or omissions of any other member.

(*c*) No member shall be liable for any damages caused by his own acts or omissions, unless such acts or omissions involve fraud or willful misconduct on the part of such member.

EXHIBIT E

RULES OF FAIR PRACTICES

The following practices are considered unfair and shall not be engaged in by contracting distributors or by their officers, employees, or agents:

(1) Any method or device whereby fluid milk is sold or offered for sale at a price less than stated in this agreement, whether by any discount, rebate, free service, merchandise, advertising allowance, credit for bulk fluid milk returned, loans or credits outside of the usual course of business or other valuable consideration or combined price for such milk together with another commodity sold or offered for sale, whether separately or otherwise, or whereby a subsidy is given for either business or information or assistance in procuring business; or whereby business is obtained, or sought to be obtained, by misrepresentation as to any article listed in Exhibit B.

(2) For any contracting distributor (*a*) to sell any fluid milk in a territory which within one year last past has been covered by him in any capacity for another distributor or (*b*) to cause to be sold through an agent or employee fluid milk in any territory which such agent or employee has within one year last past covered in any capacity for another distributor.

(3) The failure of any contracting distributor to invoice daily 3¢ per bottle for any bottle difference, over or under, for any milk delivery at any wholesale stop, or to settle for the same when the milk is paid for.

EXHIBIT F

CREAM BUYING PLAN

1. The plants of the contracting distributors located in the counties listed in Exhibit A, Schedule II, shall take delivery for distribution as Grade A Market Cream only of Grade A milk which is delivered from producers in the Los Angeles Cream shed. Such producers for the present are not to receive bases but shall be subject to the provisions of this cream buying plan.

2. There shall be an adjustment in each month for deliveries of milk for Grade A Market Cream by each producer, according to the quality thereof, the deductions to be made from each producer not delivering milk of the highest quality as set forth in Schedule I of this exhibit. The total deductions thus made shall be charged against each producer incurring said penalty and the total of all such deductions shall be handled in the following manner:

(*a*) If there be no surplus of deliveries of Grade A Milk for Grade A Market Cream above the purchases of Grade A Market Cream by distributors, in the Los Angeles Sales Area, then the total penalties shall be prorated back to the producers, including those who incurred the penalties, in proportion to the number of pounds of butterfat delivered by them to said plants, respectively.

The foregoing adjustment shall be computed for each month by the accountants of the Los Angeles Cream Clearing Association, who shall secure the necessary data from the several plants and notify them, respectively, of the resulting price adjustments to be made in the case of each producer delivering milk to each such plant for Grade A Market Cream.

(*b*) If there be a surplus of such deliveries to the plants over the aforesaid requirements of contracting distributors in the Los Angeles Sales Area, then the total amount of the penalties shall be added to the returns received from surplus products as provided in the next succeeding paragraph.

If at any time there be an excess of such deliveries of milk to the plants over the Grade A Market Cream requirements of the contracting distributors in the Los Angeles Sales Area, the plant or plants having such excess, shall manufacture such excess over requirements into butter or other milk products. The plants disposing of deliveries of milk in the foregoing manner shall be entitled to be reimbursed for the loss sustained (that is to say, the difference between the minimum price which they are obligated to pay producers for said milk in accordance with the provisions of this cream-buying plan, exclusive of penalties, and the gross proceeds of manufacturing such milk into butter and powdered skim). Such plants shall report the results of such manufacturing operations to the accountants, who shall cause such plants to be reimbursed out of any penalties incurred by the

producers under the provisions of the foregoing paragraph. If such penalties are not sufficient to fully reimburse such plants, the difference shall be charged back against all producers delivering milk for Grade A Market Cream to all the plants, pro rata, in accordance with their deliveries of such milk during such month. If there be any balance of penalties after reimbursing the plants disposing of milk in manufactured products as aforesaid, the remaining balance of such penalties shall be prorated back to the individual producers in a manner similar to that provided in the preceding paragraph. The foregoing adjustment shall be computed for each month by the accountants of the Los Angeles Cream Clearing Association who shall secure the necessary data from the several plants and shall notify them, respectively, of resulting price adjustments to be made in the case of each producer and of the amount to be paid to the plant or plants entitled to reimbursement.

3. The expenses of the said accountants including reasonable compensation for their services incurred in the operation of the Cream Buying Plan shall be prorated back to producers of milk for Grade A Market Cream delivering to the aforesaid plants, in proportion to the number of pounds of butterfat delivered by such producers. Such pro rata charges shall be collected by said plants from such producers supplying them and the moneys so collected paid to the accountants.

SCHEDULE I

The specifications for each class of milk for Grade A Market Cream and the deduction applicable to the several classes are as follows:

Class I Milk

Flavor and Odor—No. 1 or No. 2 rating:

Must be refrigerated except when delivered to plants in Santa Barbara County.

Bacterial count shall not exceed 25,000 per c.c.

If the milk has a flavor rating of No. 3, there shall be a deduction of 2 cents per pound of butterfat.

Class II Milk

Flavor and Odor—No. 1 or No. 2 rating:

Bacterial count shall not exceed 25,000 per c.c.

Class II milk shall be paid for at 1 cent less per pound of butterfat than Class I milk.

If the milk has a flavor rating of No. 3, there shall be a further deduction of 2 cents per pound of butterfat.

Class III Milk

Flavor and Odor—No. 1 or No. 2 rating:

Bacterial count shall not exceed 50,000 per c.c.

Class III milk shall be paid for at 2 cents less per pound of butterfat than Class I milk.

If the milk has a flavor rating of No. 3 there shall be a further deduction of 2 cents per pound of butterfat.

Class IV Milk

Flavor and Odor—No. 1 or No. 2 rating.

Bacterial count shall not exceed 150,000 per c. c.

Class IV milk shall be paid for at 4 cents less per pound of butterfat than Class I milk.

If the milk has a flavor rating of No. 3, there shall be a further deduction of 2 cents per pound of butterfat.

It is agreed between the contracting producers and the contracting distributors that any quality program for milk for Grade A Market Milk which might be developed by them through the Los Angeles Milk Industry Board and submitted to the Secretary for approval shall not be less stringent than that established herein for milk for Grade A Market Cream.

LICENSE FOR MILK

LOS ANGELES MILK SHED

I

As used in this License, the following words and phrases shall be defined as follows:

A. "Fluid Milk" means milk, cream, or any other of the articles listed in Exhibit B which are sold for consumption in the Los Angeles Sales Area. Fluid Milk shall be classified as follows:

(1) "Grade A Market Milk" means that portion of fluid milk which is derived from milk produced in the Los Angeles Milk Shed and which is sold for consumption in the Los Angeles Sales area as fluid milk other than as fluid cream.

(2) "Grade A Market Cream" means that portion of fluid milk which is derived from Grade A milk produced in the Los Angeles Cream Shed, and which is sold for consumption in the Los Angeles sales area as fluid milk, other than as whole milk.

B. "Producer" means any producer or association of producers of milk produced in the Los Angeles Milk Shed and/or the Los Angeles Cream Shed, and sold for consumption as fluid milk in the Los Angeles Sales Area.

C. "Distributor" means any of the following persons engaged in the business of handling fluid milk, irrespective of whether any such person is also a producer of milk:

(*a*) Pasteurizers, bottlers, or other processors of fluid milk.

(*b*) Persons distributing fluid milk at wholesale or retail (1) to hotels, restaurants, stores, or other establishments for consumption on the premises (2) to stores or other establishments for resale, or (3) to consumers.

(*c*) Persons operating stores or other establishments selling fluid milk at retail for consumption on or off the premises.

D. "Los Angeles Sales Area" means and includes the city of Los Angeles, California, and additional territory outside of the city limits of Los Angeles California, described as follows:

Beginning at a point on the coast of the Pacific Ocean where the boundary line between Ventura and Los Angeles Counties intersects said coast; thence in a northeasterly direction along the boundary line between Ventura and Los Angeles Counties to a point in the southern boundary line of Kern County; thence east along the northern boundary line of Los Angeles County to where said boundary line intersects the western boundary line of San Bernardino County; thence north along the western boundary line of San Bernardino County approximately twenty miles or where said county line jogs for point; thence east along said county line to where said line again jogs to the north, and continuing east on an extension of said line due into San Bernardino County to a point of intersection with 116°

longitude West, thence south along 116° longitude West to the southern boundary line of San Bernardino County and continuing on across Riverside County to the point where 116° Longitude West intersects the southern boundary line of Riverside County; thence west along the southern boundary line of Riverside County to a point where it intersects the eastern boundary line of Orange County; thence southwesterly along the eastern boundary line of Orange County to a point where said eastern boundary line intersects on the Pacific Coast; thence in a northwesterly direction along the Pacific Coast with its meanderings to the point of beginning; and also including the island of Santa Catalina.

E. "Los Angeles Cream Shed" means those dairy farms located in the counties of Imperial, San Louis Obispo, Tulare, Kings, Madera, Ventura, Merced, Kern, Fresno, and Santa Barbara as were producing milk for Grade A market cream on the effective date of this license, and such other dairy farms as may become entitled to produce milk for Grade A market cream, in accordance with the terms of this license; except (1) Those dairy farms producing any milk for distribution as fluid milk in said counties, and (2) those farms located in said counties which are within the Los Angeles Milk Shed as defined herein.

F. "Los Angeles Milk Shed" means those dairy farms in the counties of Los Angeles, Riverside, San Bernardino, and Orange, and also those dairy farms outside said counties as were producing milk for Grade A market milk on the effective date of this license, and such other dairy farms as may become entitled to produce milk for Grade A market milk, in accordance with the terms of this license.

G. "Los Angeles Milk Industry Board" is that Board to be organized and to have the powers and duties set forth in Exhibit D, which is attached hereto and made a part hereof.

H. "Los Angeles Cream Clearing Association" means that association (or any corporate successor thereto) composed of certain distributors who are operating separating plants in the Los Angeles Cream Shed, and supplying Grade A market cream.

I. "Secretary" means the Secretary of Agriculture of the United States.

J. "Act" means the Agricultural Adjustment Act, approved May 12, 1933, as amended.

K. "Person" means individual, partnership, corporation, association, and any other business unit.

II

Whereas, it is provided by section 8 of the Act as follows:

SEC. 8. In order to effectuate the declared policy the Secretary of Agriculture shall have power—

(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions not in conflict with existing acts of Congress or regulations pursuant thereto as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products thereof and the financing thereof * * *.

(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the

prices thereof, and as to trade practices and charges, and to keep such systems of accounts as may be necessary for the purpose of part 2 of this title, and

Whereas, by virtue of the authority vested in the Secretary by the act, the Secretary, with the approval of the President, has issued regulations entitled "Milk Regulations, Agricultural Adjustment Administration, Series 1"; and

Whereas, pursuant to said act and to said regulations, the Secretary has determined that it is necessary to issue licenses in order to eliminate unfair practices or charges that prevent or tend to prevent (1) the effectuation of the declared policy of said act with respect to milk and its products, and (2) the restoration of normal economic conditions in the marketing of such commodity and the financing thereof; and

Whereas, the Secretary, acting under the provisions of said act, for the purpose and within the limitations therein contained, after due notice and opportunity for hearing to interested parties given pursuant to the provisions of said act, and the regulations issued thereunder, and after due consideration, has on the 16th day of November 1933 executed under his hand and the official seal of the Department of Agriculture a certain agreement entitled "Marketing Agreement for Milk—Los Angeles Milk Shed", and

Whereas, the Secretary finds that the marketing of milk for distribution as fluid milk in the Los Angeles Sales Area and the distribution of said fluid milk are in both the current of interstate commerce and the current of intrastate commerce, which are inextricably intermingled;

III

Now, therefore, the Secretary of Agriculture acting under the authority vested in him as aforesaid,

Hereby licenses each and every distributor of fluid milk for consumption in the Los Angeles Sales Area to engage in the handling in the current of interstate or foreign commerce of said fluid milk subject to the following terms and conditions:

1. The schedules governing the prices at which, and the terms and conditions under which milk shall be purchased by distributors for distribution as fluid milk shall be those set forth in Exhibit A, which is attached hereto and made a part hereof.

Payments to the Producers' Arbitration Committee, Inc., made pursuant to paragraph 5, and payments to the Los Angeles Milk Industry Board, made pursuant to paragraph 4 hereof, and like payments to the Producers' Arbitration Committee, Inc., made pursuant to membership agreements, shall, respectively, be deemed part of the price paid to producers.

2. The schedules of wholesale, resale, and retail prices at which fluid milk shall be distributed and sold by the distributors in the various parts of the Los Angeles Sales Area shall be those set forth in Exhibit B.

3. Every distributor of fluid milk shall purchase and distribute milk in accordance with the terms and conditions set forth in the Production and Surplus Control Plan set forth in Exhibit C which is attached hereto and made a part hereof.

4. (*a*) Every distributor shall file, prior to the fifth (5th) day of each month, with the Chairman of the Los Angeles Milk Industry

Board a statement of (a) the quantity of milk purchased from each producer and (*b*) as to the production of such distributor a statement of the quantities produced and sold as fluid milk.

(*b*) Distributors shall not purchase milk from any producer for distribution as Grade A Market Milk, unless such producer authorizes the purchasing distributor to pay over to the Los Angeles Milk Industry Board such amount as may be determined by the Los Angeles Milk Industry Board, provided, however, that such amount shall not exceed ¼¢ for each pound of butterfat contained in the milk purchased by such distributor. Distributors having production of their own shall deduct a like amount for each pound of butterfat contained in milk produced and sold by them and pay the same to the Los Angeles Milk Industry Board. All distributors, whether such distributors have production of their own or not, shall pay to the aforesaid Los Angeles Milk Industry Board as distributors an amount equal to that paid for deducted by them, as the case may be, as aforesaid. The Board shall use said funds for the purposes specified in Exhibit D which is attached hereto and made a part hereof.

(*c*) Distributors shall not purchase milk for distribution as Grade A Market Milk from producers not members of the California Milk Producers Association, Independent Milk Producers Association, the Los Angeles County Natural Milk Producers Association, the Los Angeles Mutual Dairymen's Association, the Southern California Bottled Raw Milk Association, the Dairymens Association, Inc., of Riverside, or the Orange County Milk Producers, Inc., unless such producers authorize the purchasing distributor to pay over to the Los Angeles Milk Industry Board an amount, for each pound of butterfat contained in milk purchased from said independent nonmember producers, equal to the average amount which the members of such associations are then authorizing the distributors to pay over to such associations on behalf of their respective members, provided, however, that such deduction shall in no event exceed one cent per pound of butterfat. Distributors having production of their own of milk for distribution as Grade A Market Milk and who are not members of the aforesaid associations of producers, for the purposes of this paragraph, shall be deemed to have sold such milk as a producer and purchased such milk as a distributor and shall make payment to the Los Angeles Milk Industry Board accordingly.

Said average amount shall be determined for each month by the Los Angeles Milk Industry Board by (1) multiplying the amount per pound of butterfat authorized to be deducted in respect to each such Association by the number of pounds for which the deduction is so authorized, (2) adding the several amounts thus arrived at, and (3) dividing the resulting sum by the total number of pounds for which members of said Associations of producers have in the aggregate authorized deductions, the resulting figure being the average amount to be deducted for said month in the case of such nonmember producers.

The sum so paid shall be kept as a separate fund by said Los Angeles Milk Industry Board for the purpose of securing to said producers not members of the above-mentioned producers associations, advertising, educational, credit loss, and other benefits similar to those which are secured by the members of the aforesaid producers associations by virtue of their like payments to said producers' associations.

Los Angeles Milk Industry Board shall disburse such funds for the purposes hereinabove provided. Los Angeles Milk Industry Board shall keep separate books and records in a form satisfactory to the Secretary pertaining to such funds, which said books and records of the Los Angeles Milk Industry Board shall be subject to examination of the Secretary during the usual hours of business. Los Angeles Milk Industry Board shall, from time to time, furnish to the Secretary such information as the Secretary may require.

(*d*) The deductions which are thus made, pursuant to paragraphs 4 (*b*) and (*c*) shall be paid to the Los Angeles Milk Industry Board at the time provided in this license for making payment to producers for milk purchased.

5. (*a*) Distributors shall not purchase milk for distribution as Grade A Market Milk from any producer who is not a member of any of the associations of producers listed in Paragraph 4 unless such producer authorizes the distributor to whom such producer is delivering milk to deduct, or cause to be deducted by the particular association of producers of which any such producer is a member, each month, the following (1) for the deliveries of such producer in excess of such part thereof as was classified as base milk pursuant to the provisions of Exhibit C for such month, a sum equal to the difference between the base price for said milk and the surplus price for said milk, both prices to be determined pursuant to the provisions of Exhibit A, Schedule I, and of Exhibit A, Schedule III, and (2) for that part of the deliveries of each such producer not in excess of the producer's base, determined pursuant to the provisions of Exhibit C, the difference between the base price payable for said milk pursuant to the provisions of the aforesaid schedules of Exhibit A and the adjusted base price determined according to the provisions of the said schedules of Exhibit A and the provisions of Exhibit C. Every month such distributor or every such association of producers shall pay the said sums so deducted to the Producers' Arbitration Committee, Inc., as provided in Exhibit C, for the purpose of equitably allocating the loss involved in handling surplus milk.

(*b*) Distributors shall not purchase milk for distribution as Grade A Market Milk from any producer who is not a member of any of the associations of producers listed in Paragraph 4 unless such producer authorizes the distributor to whom such producer is delivering milk to deduct, each month, the following: (1) For the deliveries of such producer in excess of such part thereof as was classified as base milk pursuant to the provisions of Exhibit C for such month, a sum equal to the difference between the base price for said milk and the surplus price for said milk, both prices to be determined pursuant to the provisions of Exhibit A, Schedule I, and of Exhibit A, Schedule III; and (2) for that part of the deliveries of each such producer not in excess of the producer's base determined pursuant to the provisions of Exhibit C, the difference between the base price payable for said milk pursuant to the provisions of the aforesaid schedules of Exhibit A and the adjusted base price determined according to the provisions of said schedules of Exhibit A and the provisions of Exhibit C. Every such distributor shall pay the said sums so deducted to the Producers' Arbitration Committee, Inc., as provided in Exhibit C for the purpose of equitably allocating the loss involved in handling surplus milk.

(c) Every distributor having production of his own of milk for distribution as Grade A Market Milk shall pay each month the following sums to the Producers' Arbitration Committee, Inc., as provided in Exhibit C for the purpose of equitably allocating the loss of handling surplus milk: (1) For such production of such distributor in excess of such part thereof as was classified as base milk pursuant to the provisions of Exhibit C for such month, a sum equal to the difference between the base price of said milk and the surplus price of said milk, both prices to be determined pursuant to the provisions of Exhibit A, Schedule I and Schedule III; and (2) for that part of the production of each such distributor not in excess of the base determined pursuant to the provisions of Exhibit C, the difference between the base price payable for said milk pursuant to the provisions of the said schedules of Exhibit A and the adjusted base price determined according to the provisions of the said schedules of Exhibit A and the provisions of Exhibit C.

6. Every distributor of fluid milk shall purchase and distribute milk in accordance with the terms and conditions set forth in the Cream Buying Plan which is attached hereto as Exhibit F and made a part hereof.

7. The rules of fair practices set forth in Exhibit E which is attached hereto and made a part hereof shall be the rules of fair practices in the Los Angeles Sales Area.

8. Distributors shall severally maintain systems of accounts which accurately reflect the true account and condition of their respective businesses. Their respective books and records shall, during the usual hours of business, be subject to the examination of the Secretary to assist him in the furtherance of his duties with respect to this License. Distributors shall, from time to time, furnish such information to the Secretary as the Secretary may request, including information on and in accordance with forms to be supplied by him. All information obtained by or furnished to the Secretary pursuant to this paragraph shall remain the confidential information of the Secretary, and shall not be disclosed by him except upon lawful demand made by the President, or by either House of Congress, or any committee thereof, or by any court of competent jurisdiction. The Secretary, however, may combine and publish the information obtained from distributors in the form of general statistical studies or data. The Secretary shall issue regulations and prescribe penalties to be imposed in the event of any violation of the confidences or trust imposed hereby.

9. Every distributor shall purchase and sell for consumption as fluid milk and distribute for consumption as fluid milk only such milk as complies with the standards governing the production, receiving, transportation, processing, bottling, and distribution of fluid milk sold or distributed in the Los Angeles Sales Area, established pursuant to and in accordance with State, county, and city health ordinances and regulations of any of the municipalities in which said milk is sold, and also in the case of milk purchased for distribution as Grade A market cream—those which are set forth in Exhibit F of this License. The standards governing the production, receiving, transportation, processing, bottling, and distribution of fluid milk, sold or distributed in the Los Angeles Sales Area shall be those established by the State, county, and city health ordinances and regulations, of any of the

municipalities in which said milk is sold, and in addition such other requirements, not conflicting with such ordinances and regulations, as may from time to time be established by the Los Angeles Milk Industry Board, with the approval of the Secretary, and also in the case of milk purchased for distribution as Grade A Market Cream—those which are set forth in Exhibit F of this Agreement.

10. No distributor shall knowingly purchase fluid milk from or process or distribute for or sell fluid milk to any other distributor who is violating any provision of this License.

11. If any provision of this License is declared invalid or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of the remainder of this License and/or applicability thereof to any other person, circumstance, or thing shall not be affected thereby.

12. The Secretary herewith gives notice that:

(*a*) The terms and conditions of this License are hereby determined to be reasonable only in the light of conditions now prevailing in the Los Angeles Milk Shed and are not to be regarded as a precedent for the issuance of licenses in connection with other milk sheds or for any future modification or suspension of this License; and

(*b*) The Secretary reserves the privilege of approving a blanket license, pursuant to Section 8 (3) of the Act, for all milk sheds, which blanket license may make specific modifications for any particular designated milk shed to conform to the conditions then prevailing in such specific milk shed.

13. Nothing herein contained shall be construed in derogation of the rights of the Secretary to exercise any powers granted him by the Act, and, in accordance with such powers, to act in the premises whenever he shall deem it advisable.

14. Distributors shall purchase all of their milk requirements of Grade A Market Milk and Grade A milk for standardization purposes, provided such milk meets all of the health requirements provided for in this license, from producers having established bases in the Los Angeles Milk Shed. Distributors shall purchase all of their milk requirements of Grade A Market Cream from the Grade A milk producers in the Los Angeles Cream Shed, provided such milk meets all of the health requirements provided for in this License.

In witness whereof, I, Henry A. Wallace, Secretary of Agriculture, do hereby issue this License in the City of Washington, D.C., on this 16th day of November 1933, and pursuant to the provisions hereof declare this license to be effective on and after 12:01 a.m. Eastern Standard Time November 20, 1933.

H A Wallace

Secretary of Agriculture.

EXHIBIT A

PRICES TO BE PAID PRODUCERS

SCHEDULE I

PRICES FOR GRADE A MARKET MILK DELIVERED IN BULK (EXCEPT MILK DELIVERED TO PLANTS IN THE COUNTIES AND FOR THE PURPOSES SET FORTH IN SCHEDULE II)

(*a*) The prices (herein termed base prices) to be paid by distributors for Grade A Market Milk, delivered in bulk f.o.b. distributors' processing plants in Los Angeles, shall be determined in accordance with the following schedule, which provides that changes in the Los Angeles market quotations for 92 score butter shall result in a change in the base price to be paid per pound of butterfat, only after a definite discrepancy between the butter quotations and the existing price base appears. Such discrepancy shall be deemed to have appeared whenever such closing market quotation shall have moved into the section next below or next above the existing quotations, as provided in the following schedule, and shall have remained in such section for seven consecutive days. In such event, corresponding revisions in the base price shall be made on the second day next succeeding such seven-day period. Provided, however, that if, in the opinion of the Los Angeles Milk Industry Board a revision in the base price resulting from making Section 1 applicable may not be justified by economic conditions, the Los Angeles Milk Industry Board may postpone such revision for not exceeding ten days following such seven-day period for the purpose of making an economic survey and report to the Secretary. Following such economic survey and report, the Los Angeles Milk Industry Board may, with the approval of the Secretary, further postpone such revision for such time as it may recommend and the Secretary may approve.

	Los Angeles market quotation 92 score butter	Total base price per pound butterfat
Section 1	$0.00 –$0.20	$0.45
Section 2	.201– .25	.51
Section 3	.251– .30	.61

(*b*) Distributors, for the purpose of standardizing milk for market, shall purchase and use only Grade A milk, purchased at the above prices.

(*c*) The foregoing base prices are payable by distributors in respect of all milk delivered to them, but in accounting for the same they shall—

(1) On all of such deliveries of producers not in excess of such producer's base as determined under the provisions of Exhibit C, pay to each producer the foregoing prices adjusted as provided in Exhibit C, and pay the difference between the base price and the adjusted base price to Producers' Arbitration Committee, Inc., as provided under Paragraphs 5(*a*) and 5 (*b*) of this license, except in those cases where the distributor is paying the full base price to any of the associations of producers listed in Paragraph 4 of this license and such association of producers is itself paying to Producers' Arbitration Committee, Inc., the difference between the adjusted base price and the base price determined as aforesaid.

(2) On all such deliveries in excess of producer's base determined as aforesaid, pay to each producer the surplus price, as established pursuant to the provisions of this exhibit hereinafter set forth, and pay to the Producers' Arbitration Committee, Inc., the difference between the base price and the surplus price, except in those cases where the distributor is paying the full base price to any of the associations of producers listed in Paragraph 4 of this license and such association of producers is itself paying to Producers' Arbitration Committee, Inc., the difference between the base price and the surplus price determined as aforesaid.

(3) Distributors having production of their own shall as to such production pay monthly to Producers' Arbitration Committee, Inc., the difference between the base price and the adjusted base price as provided under paragraph 5 (*c*) of this License; and shall on such production in excess of such distributors' base as a producer pay monthly to the Producers' Arbitration Committee, Inc., the difference between the base price and the surplus price.

(*d*) *Surplus price.*—Milk delivered by producers to distributors in excess of quantities representing the base of each such producer shall be paid for at the surplus price, and distributors having production of their own may retain on account of such production in excess of their established bases as producers the surplus price. The surplus price shall be the monthly average of the daily quotation for ninety-two score butter prevailing on the Los Angeles market during the month in which such milk is to be accounted for.

(*e*) *Where the milk passes through a country receiving station* the following deductions per pound of butterfat shall be made.

A. The cost of transportation from the country receiving station to Los Angeles according to truck hauling tariff of the California State Railway Commission plus an allowance of four cents (4) per pound butterfat for preparation of such shipment.

B. If delivery is taken at the producer's ranch, in addition to the foregoing deduction, the actual reasonable cost of hauling to the country receiving station, not exceeding three cents (3) per pound butterfat.

SCHEDULE II

PRICES FOR MILK DELIVERED IN BULK TO PLANTS IN CERTAIN COUNTIES FOR SEPARATION INTO CREAM AND SKIMMED MILK AND/OR FOR PROCESSING INTO BUTTERMILK, CONDENSED MILK, COTTAGE CHEESE, OR SKIMMED MILK POWDER

1. The minimum buying price per pound of butterfat to be paid by the processing plants in the several counties listed below for milk

delivered in bulk for the purposes set forth in the heading of this Schedule II shall be:

(*a*) The monthly average of the daily quotations in Los Angeles for 92-score butter for the month in which deliveries are made to such plant, plus the premiums which may prevail according to the schedules set forth in paragraphs (*b*) and (*c*) below in the several counties listed below when the quotations of Section 1, Section 2, and Section 3, respectively, of Exhibit A and revised base prevail.

	When section 1 prevails	When section 2 prevails	When section 3 prevails
(*b*) County:			
Merced	$0. 06	$0. 09	$0. 13
Fresno	. 06½	. 09½	. 13½
Tulare	. 06¾	. 09¾	. 13¾
Kings	. 06¾	. 09¾	. 13¾
Santa Barbara	. 06¾	. 09¾	. 13¾
Imperial	. 06¾	. 09¾	. 13¾
Kern	. 07¼	. 10¼	. 14¼

(*c*) In addition to the above premiums, add the following premiums for solids-not-fat values. When the average monthly carload price at Los Angeles of Roller Process powdered skim milk, as determined by the Los Angeles Milk Industry Board from available data, is—

3¼ cents per pound add ½ cent per pound of butterfat
3½ cents per pound add 1 cent per pound of butterfat
3¾ cents per pound add 1½ cents per pound of butterfat
4 cents per pound add 2 cents per pound of butterfat
4¼ cents per pound add 2½ cents per pound of butterfat
4½ cents per pound add 3 cents per pound of butterfat
4¾ cents per pound add 3½ cents per pound of butterfat
5 cents per pound add 4 cents per pound of butterfat
5¼ cents per pound add 4½ cents per pound of butterfat
5½ cents per pound add 5 cents per pound of butterfat
5¾ cents per pound add 5½ cents per pound of butterfat
6 cents per pound add 6 cents per pound of butterfat

2. The foregoing prices shall be subject to the terms and conditions set forth in the Cream Buying Plan which is attached hereto as Exhibit F.

SCHEDULE III

PRICES FOR RAW GRADE "A" MARKET MILK DELIVERED IN BOTTLES TO DISTRIBUTORS (EXCEPT TO STORES)

(*a*) The following schedule of minimum buying prices to be paid to producers by distributors (except stores) for bottled Grade "A" raw milk shall prevail when the conditions set forth in Sections 1, 2, and 3, respectively, of Exhibit A and revised base price prevail:

	Price paid to producers per quart
When conditions of Section 1 prevail	$0. 05¼
When conditions of Section 2 prevail	. 06
When conditions of Section 3 prevail	. 06¾

(*b*) Such milk shall be delivered by producers to distributors' city processing plant bottled and iced in cases. Distributors will furnish bottles, cases, and caps.

(*c*) For the purpose of making the adjustments provided for in this Schedule III and in Exhibit C, the foregoing prices per quart of bottled milk shall be reduced to base prices per pound of butterfat (1) on the basis that each such quart contains milk with 4 percent butterfat content, and (2) so as to eliminate from the said adjustment all extra cost relating to the bottling and handling of the bottle product. Accordingly, the base price of such milk shall be determined in the following manner.

(1) Each quart of milk shall be taken to be the equivalent of .086 pounds of butterfat.

(2) Multiply the total number of quarts delivered by .086; the resulting figure will be the number of pounds of butterfat deemed to have been delivered.

(3) The base price per pound of butterfat shall be—

When conditions of Section 1 prevail	$0. 45
When conditions of Section 2 prevail	. 51
When conditions of Section 3 prevail	. 61

(*d*) The prices set forth in paragraph A are payable by distributors in respect of all milk delivered to them, but in accounting for the same they shall—

(1) On all of the deliveries of such producer not in excess of such producer's base as determined under the provisions of Exhibit C, pay to each producer the difference between the foregoing prices per quart of bottled milk as set forth in paragraph (*a*) for all quarts delivered and the base price per pound of butterfat as set forth in paragraph (*c*) for all pounds of butterfat delivered; and pay each producer the base price adjusted as provided in Exhibit C, and pay the difference between the base price and the adjusted base price to Producers' Arbitration Committee, Inc., as provided under Paragraphs 5(*a*), 5(*b*), and 5(*c*) of this license, except in those cases where the distributor is paying the full base price to any of the associations of producers listed in paragraph 4 of this license and such association of producers is itself paying to Producers' Arbitration Committee, Inc., the difference between the base price and the adjusted base price determined as aforesaid.

(2) On all deliveries in excess of producer's base determined as aforesaid, pay to each producer the difference between the foregoing prices per quart of bottled milk as set forth in paragraph (*a*) for all quarts delivered and the base price per pound of butterfat as set forth in paragraph (*c*), for all pounds of butterfat delivered; and pay each producer the surplus price, as established pursuant to the provisions of this exhibit hereinafter set forth, and pay to the Producers' Arbitration Committee, Inc., the difference between the base price and the surplus price, except in those cases where the distributor is paying the full base price to any of the associations of producers listed in paragraph 4 of this license and such association of producers is itself paying to Producers' Arbitration Committee, Inc., the difference between the base price and the surplus price determined as aforesaid.

Surplus price.—Milk delivered by producers to distributors in excess of quantities representing the base of each such producer shall be paid for at a surplus price to be established as follows:

The surplus price shall be the monthly average of the daily quotation for 92 score butter prevailing on the Los Angeles Market for the month in which deliveries by producers have been made.

EXHIBIT B

SELLING PRICES

1. *General provisions applicable to all schedules of the exhibit.*—The minimum prices set forth in the following schedules are based on milk containing an average butterfat content of 4%, subject to a tolerance for normal fluctuations of 0.2 of one percent up or down for any 30-day period.

2. Any distributor, who during any 30-day period, has sold milk in bulk or bottles averaging a butterfat content in excess of 4.2%, but not in excess of 4.5%, shall for the next succeeding 30-day period increase the selling price stipulated in the following schedules for like quality milk at the rate of 1¢ per quart. Any distributor who, during any 30-day period, has sold milk in bulk or bottles averaging a butterfat content in excess of 4.5% but not in excess of 5% shall, in addition to the above increase, increase the selling price for like quality at the rate of 1¢ per quart; and if the aforesaid average butterfat content shall exceed 5%, the distributor shall increase selling prices for like quality milk by an additional 1¢ for each additional 0.5 of one percent of butterfat contained in said milk over 5%.

3. Prices are for bottled milk unless otherwise specified.

4. The following price schedules do not include any occupational or sales tax imposed by the laws of any State, nor shall any deduction from said price schedules be made in any case therefor.

5. Peddlers shall sell all products at the established retail and wholesale prices respectively.

6. Sales of milk by Distributors to any unemployment relief agency may be made at prices below those set forth in Exhibit B.

7. Sales of articles in containers shall be made only in containers of the sizes and types specified, and where a grade and/or percentage of butterfat content is specified, only at the specified grade and/or percentage of butterfat.

SCHEDULE I

Los Angeles Sales District

(Includes all territory in the Los Angeles Sales Area except that specified as included in the San Bernardino Sales District and the Orange County Sales District.)

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92-score butter is such that Section 1 of Exhibit A and revised base is in effect:

	Wholesale prices	Store selling prices	Home delivered prices
Milk, grade A, pasteurized:			
10-gallon cans	$2.50	----------	----------
3-gallon cans	.80	----------	----------
2-gallon cans	.55	----------	----------
1-gallon cans	.30	----------	----------
Quarts	.07½	$0.09	$0.10
Pints	.05	.06	.07
Third quarts	.04	----------	----------
Half pints	.03	----------	----------
Raw milk, grade A:			
Quarts	.07½	.09	.10
Pints	.05	.06	.07
Third quarts	.04	----------	----------
Half pints	.03	----------	----------
Guaranteed milk:			
Quarts	.11	.12	.13
Pints	.06	.07	.08
Third quarts	.05½	----------	----------
Half pints	.04½	----------	----------
Raw milk, certified:			
Quarts	.13	.15	.15
Pints	.08	.10	.10
Third quarts	.06	----------	----------
Half pints	.05	----------	----------
Chocolate drink: Quarts	.07½	.09	.10
Coffee cream, 22 percent:			
10-gallon cans	8.50	----------	----------
3-gallon cans	2.70	----------	----------
2-gallon cans	1.80	----------	----------
Quarts	.25	.35	.35
Pints	.15	.20	.22
Half pints	.09	.11	.12
Table cream, 27 percent:			
10-gallon cans	10.00	----------	----------
3-gallon cans	3.15	----------	----------
2-gallon cans	2.10	----------	----------
Quarts	.28	.40	.40
Pints	.17	.22	.25
Half pints	.11	.13	.14
Whipping cream, 38 percent:			
10-gallon cans	14.00	----------	----------
3-gallon cans	4.65	----------	----------
2-gallon cans	3.10	----------	----------
Quarts	.40	.60	.60
Pints	.27	.35	.37
Half pints	.15	.18	.20
Sour cream:			
Gallon	1.00	----------	----------
Half pints	.08	.10	.11
Churned buttermilk:			
10-gallon cans	2.00	----------	----------
3-gallon cans	.75	----------	----------
2-gallon cans	.50	----------	----------
1-gallon cans	.30	----------	----------
Quarts	.07½	.09	.10
Third quarts	.04	----------	----------
Half pints	.03	----------	----------
Skim milk:			
10-gallon cans	1.40	----------	----------
3-gallon cans	.32	----------	----------
1-gallon cans	.16	----------	----------
Quarts	.06	.07	.08
Creamed cottage cheese:			
Pounds bulk	.11	.15	----------
Cartons or jars, 10 ounces or less	.08	.10	.10

SCHEDULE II

Los Angeles Sales District

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotations of 92 score butter is such that Section 2 of Exhibit A and revised base is in effect:

	Wholesale prices	Store selling prices	Home delivered prices
Milk, Grade A, pasteurized:			
10-gallon cans	$2.85		
3-gallon cans	.90		
2-gallon cans	.65		
1-gallon can	.34		
Quarts	.08½	$0.10	$0.11
Pints	.06		
Third quarts	.04½		
Half pints	.03½		
Raw milk, Grade A:			
Quarts	.08½	.10	.11
Pints	.06	.07	.08
Third quarts	.04½		
Half pints	.03½		
Guaranteed milk:			
Quarts	.12	.13	.14
Pints	.07	.08	.09
Third quarts	.06		
Raw milk, certified:			
Quarts	.14	.16	.16
Pints	.09	.11	.11
Third quarts	.06½		
Half pints	.05½		
Chocolate drink, quarts	.08½	.10	.11
Coffee cream, 22 percent:			
10-gallon cans	9.50		
3-gallon cans	3.20		
2-gallon cans	2.20		
Quarts	.30	.38	.40
Pints	.17	.22	.24
Half pints	.10	.12	.13
Table cream, 27 percent:			
10-gallon cans	11.50		
3-gallon cans	3.65		
2-gallon cans	2.50		
Quarts	.33	.43	.45
Pints	.19	.24	.27
Half pints	.12	.14	.15
Whipping cream:			
10-gallon cans	15.50		
3-gallon cans	5.50		
2-gallon cans	3.65		
Quarts	.48	.65	.68
Pints	.30	.38	.40
Half pints	.17	.20	.22
Sour cream:			
Gallon	1.10		
Half pints	.09	.11	.12

	Wholesale prices	Store selling prices	Home delivered prices
Churned buttermilk:			
10-gallon cans	$2.40	----------	----------
3-gallon cans	.85	----------	----------
2-gallon cans	.60	----------	----------
1-gallon cans	.34	----------	----------
Quarts	.08½	$0.10	$0.11
Third quarts	.04½	----------	----------
Half pints	.03½	----------	----------
Skim milk:			
10-gallon cans	1.60	----------	----------
3-gallon cans	.55	----------	----------
2-gallon cans	.40	----------	----------
1-gallon cans	.20	----------	----------
Quarts	.07	.08	.09
Creamed cottage cheese:			
Pounds, bulk	.12	.16	----------
Cartons or jars, 10 ounces or less	.09	.11	.11

SCHEDULE III

Los Angeles Sales District

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92-score butter is such that Section 3 of Exhibit A and revised base is in effect:

	Wholesale prices	Store selling prices	Home delivered prices
Milk, Grade A:			
10-gallon cans	$3.15	----------	----------
3-gallon cans	1.00	----------	----------
2-gallon cans	.72	----------	----------
1-gallon cans	.38	----------	----------
Quarts	.09½	$0.11	$0.12
Pints	.07	.08	.09
Third quarts	.05	----------	----------
Half pints	.04	----------	----------
Raw milk, Grade A:			
Quarts	.09½	.11	.12
Pints	.07	.08	.09
Third quarts	.05	----------	----------
Half pints	.04	----------	----------
Guaranteed milk:			
Quarts	.13	.14	.15
Pints	.08	.09	.10
Third quarts	.06½	----------	----------
Half pints	.05½	----------	----------
Raw milk, certified:			
Quarts	.15	.17	.17
Pints	.10	.12	.12
Third quarts	.07	----------	----------
Half pints	.06	----------	----------
Chocolate drink, quarts	.09½	.11	.12

	Wholesale prices	Store selling prices	Home delivered prices
Coffee cream, 22 percent:			
10-gallon cans	$11.00	----------	----------
3-gallon cans	3.55	----------	----------
2-gallon cans	2.45	----------	----------
Quarts	.34	$0.42	$0.44
Pints	.19	.25	.27
Half pints	.11	.13	.14
Table cream, 27 percent:			
10-gallon cans	13.00	----------	----------
3-gallon cans	4.10	----------	----------
2-gallon cans	2.80	----------	----------
Quarts	.40	.50	.52
Pints	.21	.26	.29
Half pints	.13	.15	.16
Whipping cream, 38 percent:			
10-gallon cans	18.00	----------	----------
5-gallon cans	6.15	----------	----------
2-gallon cans	4.10	----------	----------
Quarts	.53	.70	.73
Pints	.36	.44	.46
Half pints	.19	.22	.24
Sour cream:			
Gallon	1.25	----------	----------
Half pints	.10	.12	.13
Churned buttermilk:			
10-gallon cans	2.70	----------	----------
3-gallon cans	.95	----------	----------
2-gallon cans	.70	----------	----------
1-gallon cans	.38	----------	----------
Quarts	.09½	.11	.12
Third quarts	.05	----------	----------
Half pints	.04	----------	----------
Skim milk:			
10-gallon cans	1.80	----------	----------
3-gallon cans	.65	----------	----------
2-gallon cans	.48	----------	----------
1-gallon cans	.25	----------	----------
Quarts	.08	.09	.10
Creamed cottage cheese:			
Pound, bulk	.13	.17	----------
Cartons or jars, 10 ounces or less	.09	.11	.11

SCHEDULE IV

San Bernardino Sales District

The San Bernardino District includes all portions of Riverside and San Bernardino counties which are within the Los Angeles Sales Area as described in Paragraph D of this License, together with such towns and rural districts in Los Angeles County as are in whole or in part within a seven-mile radius, measured from the city hall of Pomona, Calif.

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92-score butter is such that Section 1 of Exhibit A and revised base is in effect:

	Wholesale prices	Store selling prices	Home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$2.50	----------	----------
3-gallon cans	.50	----------	----------
2-gallon cans	.35	----------	----------
1-gallon cans	.30	----------	----------
Quarts	.08	$0.10	$0.10
Pints	.06	.07	.07
Third quarts	.04	----------	----------
Half pints	.03½	----------	----------
Gallons, bulk [1]	.35	----------	----------
Guaranteed milk:			
Quarts	.11	.13	.13
Pints	.07	.08	.08
Raw milk, certified:			
Quarts	.13	.15	.15
Pints	.08	.10	.10
Third quarts	.06	----------	----------
Half pints	.05	----------	----------
Chocolate drink, quarts	.08	.10	.10
Table cream, 25 percent:			
3-gallon cans	2.90	----------	----------
2-gallon cans	1.95	----------	----------
Quarts	.30	.36	.36
Pints	.17	.25	.25
Half pints	.11	.14	.14
Whipping cream, 38 percent:			
3-gallon cans	4.65	----------	----------
2-gallon cans	3.10	----------	----------
Quarts	.40	.60	.60
Pints	.27	.37	.37
Half pints	.15	.20	.20
Sour cream:			
Gallons	1.00	----------	----------
Half pints	.08	.11	.11
Churned buttermilk:			
10-gallon cans	2.00	----------	----------
3-gallon cans	.75	----------	----------
2-gallon cans	.50	----------	----------
1-gallon cans	.30	----------	----------
Quarts	.08	.10	.10
Third quarts	.04	----------	----------
Half pints	.03½	----------	----------
Skim milk:			
10-gallon cans	1.40	----------	----------
3-gallon cans	.45	----------	----------
2-gallon cans	.32	----------	----------
1-gallon cans	.16	----------	----------
Quarts	.06	----------	.08
Creamed cottage cheese:			
Pounds, bulk	.11	.15	----------
Cartons or jars, 10 ounces or less	.08	.10	.10

[1] This price applies only to bulk milk sold on cash-and-carry basis at creamery or dairy.

NOTE.—Prices for Beaumont, Banning, Palm Springs, Indio, and Coachella; prices for Arrowhead, Big Bear, Crestline, and other mountain resorts, use wholesale prices plus motor freight schedule; interprice to licensed dairies, a 10 percent reduction from all wholesale prices will be made.

The prices listed below will apply for Beaumont, Banning, Palm Springs, Coachella, and Indio:

	Wholesale prices	Minimum store selling prices	Minimum home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$3.00	----------	----------
3-gallon cans	1.00	----------	----------
2-gallon cans	.65	----------	----------
1-gallon cans	.35	----------	----------
Quarts	.11	$0.14	$0.14
Pints	.06	.08	.08
Third quarts	.04	----------	----------
Half pints	.03½	----------	----------
Guaranteed milk:			
Quarts	.14	.17	.17
Half pints	.04	.06	.06
Certified milk:			
Quarts	.18	.23	.23
Pints	.10	.13	.13
Half pints	.05	.07	.07
Chocolate drink, quarts	.09	.12	.12
Table cream, 25 percent:			
3-gallon cans	3.40	----------	----------
2-gallon cans	2.35	----------	----------
Quarts	.37	.43	.43
Pints	.21	.29	.29
Half pints	.13	.16	.16
Whipping cream, 38 percent:			
3-gallon cans	5.00	----------	----------
2-gallon cans	3.50	----------	----------
Quarts	.58	.70	.70
Pints	.38	.42	.42
Half pints	.18	.23	.23
Buttermilk, churned:			
10-gallon cans	2.75	----------	----------
Gallons	.35	----------	----------
Quarts	.10	.12	.12
Skim milk:			
10 gallons or more	1.75	----------	----------
Gallons	.20	----------	----------
Quarts	.07	.09	.09
Creamed cottage cheese:			
Pounds, bulk	.13	.17	----------
Cartons or jars, 10 ounces or less	.10	.12	.12

SCHEDULE V

San Bernardino District

The San Bernardino District includes all portions of Riverside and San Bernardino counties which are within the Los Angeles Area as described in Paragraph D of this License, together with such towns and rural districts in Los Angeles County as are wholly or in part within a seven-mile radius, measured from the city hall of Pomona, Calif.

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92 score butter is such that section 2 of Exhibit A and revised base is in effect:

	Wholesale prices	Store selling prices	Home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$2.85		
3-gallon cans	.90		
2-gallon cans	.65		
1-gallon cans	.34		
Quarts	.09	$0.11	$0.11
Pints	.07	.08	.08
Third quarts	.04½		
Half pints	.03½		
Gallons, bulk [1]	.40		
Guaranteed milk:			
Quarts	.12	.14	.14
Pints	.08	.09	.09
Raw milk, certified:			
Quarts	.14	.16	.16
Pints	.09	.11	.11
Third quarts	.06½		
Half pints	.05½		
Chocolate drink: Quarts	.09	.11	.11
Table cream, 25 percent:			
3-gallon cans	3.10		
2-gallon cans	2.10		
Quarts	.33	.40	.40
Pints	.19	.27	.27
Half pints	.12	.15	.15
Whipping cream, 38 percent:			
3-gallon cans	5.50		
2-gallon cans	3.65		
Quarts	.48	.68	.68
Pints	.30	.40	.40
Half pints	.17	.22	.22
Sour Cream:			
Gallons	1.10		
Half pints	.09	.12	.12
Churned Buttermilk:			
10-gallon cans	2.40		
3-gallon cans	.85		
2-gallon cans	.60		
1-gallon cans	.34		
Quarts	.09	.11	.11
Third quarts	.04½		
Half pints	.03½		
Skim Milk:			
10-gallon cans	1.50		
3-gallon cans	.55		
2-gallon cans	.40		
1-gallon cans	.20		
Quarts	.07		.09
Creamed Cottage Cheese:			
Pounds, bulk	.12	.16	
Cartons or jars, 10-oz. or less	.09	.11	.11

[1] This price applied only to bulk milk sold on cash and carry basis at creamery or dairy.

Prices for Arrowhead, Big Bear, Crestline, and other mountain resorts, use wholesale prices plus Motor Transit Freight Schedule; Inter-price to licensed dairies, a 10% reduction from all wholesale prices will be made.

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The prices listed below will apply for Beaumont, Banning, Palm Springs, Coachella, and Indio:

	Wholesale prices	Store selling prices	Home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$3. 50	----------	----------
3-gallon cans	1. 05	----------	----------
2-gallon cans	. 70	----------	----------
1-gallon cans	. 40	----------	----------
Quarts	. 12	$0. 15	$0. 15
Pints	. 07	. 09	. 09
Third quarts	. 05	----------	----------
Half pints	. 04	----------	----------
Guaranteed milk:			
Quarts	. 15	. 18	. 18
Half pints	. 05	. 07	. 07
Certified milk:			
Quarts	. 20	. 25	. 25
Pints	. 12	. 15	. 15
Half pints	. 06	. 07	. 07
Chocolate milk: Quarts	. 10	. 13	. 13
Table cream, 25 percent:			
3-gallon cans	4. 50	----------	----------
2-gallon cans	3. 00	----------	----------
Quarts	. 50	. 60	. 60
Pints	. 30	. 40	. 40
Half pints	. 17	. 22	. 22
Whipping cream, 38 percent:			
3-gallon cans	5. 50	----------	----------
2-gallon cans	4. 00	----------	----------
Quarts	. 80	. 90	. 90
Pints	. 45	. 50	. 50
Half pints	. 25	. 30	. 30
Buttermilk, churned:			
10-gallon cans	3. 50	----------	----------
Gallons	. 40	----------	----------
Quarts	. 12	. 14	. 14
Skim milk:			
10-gallons	2. 00	----------	----------
Gallons	. 25	----------	----------
Quarts	. 10	. 10	. 10
Creamed cottage cheese:			
Pounds, bulk	. 14	. 18	----------
Cartons or jars 10 oz. or less	. 11	. 13	. 13

SCHEDULE VI

San Bernardino District

The San Bernardino Sales District includes all portions of Riverside and San Bernardino counties which are within the Los Angeles Sales Area as described in Paragraph D of this License, together with such towns and rural districts in Los Angeles County as are wholly or in part within a seven-mile radius, measured from the city hall of Pomona, Calif.

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 3 of Exhibit A and revised base is in effect:

	Wholesale prices	Minimum store selling prices	Minimum home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$3. 15	----------	----------
3-gallon cans	1. 00	----------	----------
2-gallon cans	. 72	----------	----------
1-gallon cans	. 38	----------	----------
Quarts	. 10	$0. 12	$0. 12
Pints	. 07	. 09	. 09
Third quarts	. 05	----------	----------
Half pints	. 04	----------	----------
Gallon, bulk [1]	. 44	----------	----------
Guaranteed milk:			
Quarts	. 13	. 15	. 15
Pints	. 08	. 10	. 10
Raw milk, certified:			
Quarts	. 15	. 17	. 17
Pints	. 10	. 12	. 12
Third quarts	. 07	----------	----------
Half pints	. 06	----------	----------
Chocolate milk: Quarts	. 10	. 12	. 12
Table cream, 25 percent:			
3-gallon cans	4. 00	----------	----------
2-gallon cans	2. 70	----------	----------
Quarts	. 40	. 50	. 50
Pints	. 21	. 29	. 29
Half pints	. 13	. 16	. 16
Whipping cream, 38 percent:			
3-gallon cans	6. 20	----------	----------
2-gallon cans	4. 10	----------	----------
Quarts	. 53	. 73	. 73
Pints	. 36	. 46	. 46
Half pints	. 19	. 24	. 24
Sour cream:			
Gallons	1. 25	----------	----------
Half pints	. 10	. 13	. 13
Churned buttermilk:			
10-gallon cans	2. 70	----------	----------
3-gallon cans	. 95	----------	----------
2-gallon cans	. 70	----------	----------
1-gallon cans	. 38	----------	----------
Quarts	. 10	. 12	. 12
Third quarts	. 05	----------	----------
Half pints	. 04	----------	----------
Skim milk:			
10-gallon cans	1. 80	----------	----------
3-gallon cans	. 65	----------	----------
2-gallon cans	. 48	----------	----------
1-gallon cans	. 25	----------	----------
Quarts	. 08	. 10	. 10
Creamed cottage cheese:			
Pounds, bulk	. 13	. 17	----------
Cartons or jars, 10 ounces or less	. 09	.. 11	. 11

[1] This price applies only to bulk milk sold on cash and carry basis at creamery or dairy.

Inter-price licensed dairies, a 10% reduction will be made from all listed wholesale prices; mountain resorts and desert areas add to all milk, Motor Transit Freight.

The prices listed below will apply for Beaumont, Banning, Palm Springs, Coachella, and Indio.

	Wholesale prices	Minimum store selling prices	Minimum home delivered prices
Grade A pasteurized and raw milk:			
10-gallon cans	$3. 85	----------	----------
3-gallon cans	1. 35	----------	----------
2-gallon cans	. 77	----------	----------
1-gallon cans	. 44	----------	----------
Quarts	. 13	$0. 16	$0. 16
Pints	. 07	. 09	. 09
Third quarts	.. 05	----------	----------
Half pints	. 04	----------	----------
Guaranteed milk:			
Quarts	. 15	. 18	. 18
Pints	. 08	. 10	. 10
Half pints	. 05	. 07	. 07
Certified milk:			
Quarts	. 20	. 25	. 25
Pints	. 12	. 15	. 15
Half pints	. 06	. 07	. 07
Chocolate drink: Quarts	. 10	. 13	. 13
Table cream, 25 percent:			
3-gallon cans	4. 50	----------	----------
2-gallon cans	3. 00	----------	----------
Quarts	. 50	. 60	. 60
Pints	. 30	. 40	. 40
Half pints	. 17	. 22	. 22
Whipping cream, 38 percent:			
3-gallon cans	5. 50	----------	----------
2-gallon cans	4. 00	----------	----------
Quarts	. 80	. 90	. 90
Pints	. 45	. 50	. 50
Half pints	. 25	. 30	. 30
Buttermilk, churned:			
10-gallon cans	3. 50	----------	----------
Gallons	. 40	----------	----------
Quarts	. 12	. 14	. 14
Skim milk:			
10 gallons or more	2. 00	----------	----------
Gallons	. 25	----------	----------
Quarts	. 08	. 10	. 10
Creamed cottage cheese:			
Pounds, bulk	. 14	. 18	----------
Cartons or jars, 10 ounces or less	. 11	. 13	. 13

SCHEDULE VII

ORANGE COUNTY DISTRICT, 10 CENTS PER QUART, RETAIL

The Orange County Sales District includes all communities in Orange County.

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 1 of Exhibit A and revised base is in effect.

	Wholesale prices	Store selling prices	Home delivered prices
Milk, grade A, pasteurized:			
10-gallon cans	$2.50		
3-gallon cans	.85		
2-gallon cans	.60		
1-gallon cans	.32		
Quarts	.08	$0.10	$0.10
Pints	.06	.07	.07
Third quarts	.04		
Half pints	.03		
Raw milk, grade A:			
Quarts	.08	.10	.10
Pints	.06	.07	.07
Third quarts	.04		
Half pints	.03		
Guaranteed milk:			
Quarts	.11	.13	.13
Pints	.08	.09	.09
Raw milk, certified:			
Quarts	.18	.20	.20
Pints	.11	.12	.12
Third quarts	.05		
Half pints	.04		
Chocolate drink: Quarts	.08	.10	.10
Table cream, 27 percent:			
3-gallon cans	3.15		
2-gallon cans	2.10		
Quarts	.28	.40	.40
Half pints	.11	.14	.14
Whipping cream, 38 percent:			
3-gallon cans	4.65		
2-gallon cans	3.10		
Quarts	.40	.60	.60
Half pints	.17	.20	.20
Sour cream:			
Gallon cans	1.00		
Half pints	.09	.11	.11
Churned buttermilk:			
10-gallon cans	2.00		
3-gallon cans	.85		
2-gallon cans	.60		
1-gallon cans	.32		
Quarts	.08	.10	.10
Third quarts	.04		
Half pints	.03		
Skim milk:			
10-gallon cans	1.30		
3-gallon cans	.45		
2-gallon cans	.30		
1-gallon cans	.15		
Quarts	.06	.07	.07
Creamed cottage cheese:			
Pounds, bulk	.11	.15	
Cartons or jars, 10 ounces or less	.08	.10	.10
16-ounce returnable glass	.13	.15	.15

SCHEDULE VIII

Orange County Sales District

The Orange County Sales District includes all communities in Orange County.

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 2 of Exhibit A and revised base is in effect.

	Wholesale prices	Store selling prices	Home delivered prices
Milk, grade A, pasteurized:			
10-gallon cans	$2.85		
3-gallon cans	.95		
2-gallon cans	.70		
1-gallon cans	.36		
Quarts	.09	$0.11	$0.11
Pints	.07	.08	.08
Third quarts	.04½		
Half pints	.03½		
Raw milk, grade A:			
Quarts	.09	.11	.11
Pints	.07	.08	.08
Third quarts	.04½		
Half pints	.03½		
Guaranteed milk:			
Quarts	.12	.14	.14
Pints	.09	.10	.10
Raw milk, certified:			
Quarts	.18	.20	.20
Pints	.11	.12	.12
Third quarts	.05½		
Half pints	.04½		
Chocolate drink: Quarts	.09	.11	.11
Table cream, 27 percent:			
3-gallon cans	3.65		
2-gallon cans	2.50		
Quarts	.45	.50	.50
Half pints	.13	.15	.15
Whipping cream, 38 percent:			
3-gallon cans	5.50		
2-gallon cans	3.65		
Quarts	.58	.68	.68
Half pints	.19	.22	.22
Sour cream:			
Gallon	1.10		
Half pints	.10	.12	.12
Churned buttermilk:			
10-gallon cans	2.40		
3-gallon cans	.95		
2-gallon cans	.70		
1-gallon can	.36		
Quarts	.09	.11	.11
Third quarts	.04½		
Half pints	.03½		
Skim milk:			
10-gallon cans	1.50		
3-gallon cans	.55		
2-gallon cans	.38		
1-gallon can	.20		
Quarts	.07	.08	.08
Creamed cottage cheese:			
Pounds, bulk	.12	.16	
Cartons or jars, 10 ounces or less	.09	.11	.11
16-ounce, returnable	.14	.16	.16

SCHEDULE IX

Orange County Sales District

The Orange County Sales District includes all communities in Orange County.

The following minimum wholesale, resale, and retail prices shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 3 of Exhibit A and revised base is in effect.

	Wholesale prices	Store selling prices	Home delivered prices
Milk, Grade A, pasteurized:			
10-gallon cans	$3.20	----------	----------
3-gallon cans	1.05	----------	----------
2-gallon cans	.80	----------	----------
1-gallon cans	.40	----------	----------
Quarts	.10	$0.12	$0.12
Pints	.08	.09	.09
Third quarts	.06	----------	----------
Half pints	.04	----------	----------
Raw milk, Grade A:			
Quarts	.10	.12	.12
Pints	.08	.09	.09
Third quarts	.05	----------	----------
Half pints	.04	----------	----------
Guaranteed milk:			
Quarts	.13	.15	.15
Pints	.10	.11	.11
Raw milk, certified:			
Quarts	.19	.21	.21
Pints	.12	.13	.13
Third quarts	.06	----------	----------
Half pints	.05	----------	----------
Chocolate drink, quarts	.10	.12	.12
Table cream, 27 percent:			
3-gallon cans	4.10	----------	----------
2-gallon cans	2.80	----------	----------
Quarts	.50	.55	.55
Half pints	.14	.16	.16
Whipping cream, 38 percent:			
3-gallon cans	6.20	----------	----------
2-gallon cans	4.50	----------	----------
Quarts	.66	.76	.76
Half pints	.21	.24	.24
Sour cream:			
Gallon	1.20	----------	----------
Half pints	.11	.13	.13
Churned buttermilk:			
10-gallon cans	2.80	----------	----------
3-gallon cans	1.05	----------	----------
2-gallon cans	.80	----------	----------
1-gallon cans	.40	----------	----------
Quarts	.10	.12	.12
Third quarts	.05	----------	----------
Half pints	.04	----------	----------
Skim milk:			
10-gallon cans	1.70	----------	----------
3-gallon cans	.65	----------	----------
2-gallon cans	.46	----------	----------
1-gallon cans	.25	----------	----------
Quarts	.08	.09	.09
Creamed cottage cheese:			
Pounds, bulk	.13	.17	----------
Cartons or jars, 10 ounces or less	.09	.11	.11
16-ounce returnable jars	.15	.17	.17

SCHEDULE X

Cottage Cheese and Churned Buttermilk Rules, Regulations, and Prices

1. The following rules, regulations, and price schedules apply to the Los Angeles, San Bernardino, and Orange Districts, except Beaumont, Banning, Palm Springs, Coachella, and Indio in the San Bernardino Sales Districts. There shall be added to the prices in this schedule in the case of mountain resorts and desert areas in the San Bernardino District the motor transit freight rate as established by the California Railroad Commission, irrespective of the actual mode of delivery.

QUANTITY DISCOUNTS

2. (*a*) The wholesale prices of churned buttermilk in 10-gallon cans set forth in Schedules B (1) to B (9), inclusive, of this exhibit shall be subject to the following quantity discount: When a customer buys more than twelve 10-gallon cans per week, there shall be a discount of ten percent on the wholesale price of 10-gallon cans set forth in said schedules. All sales to customers shall be invoiced at the full wholesale price. At the end of each month credit shall be granted to those customers whose purchases are such as entitle them to the foregoing discount for discount so earned.

(*b*) The wholesale prices of bulk creamed cottage cheese set forth in Schedules B (1) to B (9), inclusive, of this Exhibit shall be subject to the following quantity discounts: When a customer buys more than 250 pounds and not in excess of 1,250 pounds per month, there shall be a discount of one cent per pound. When a customer buys in excess of 1,250 pounds per month, there shall be a discount of two cents per pound. All sales to customers shall be invoiced net without discount. At the end of each month, credit shall be granted to those customers whose purchases are such as entitle them to the foregoing discounts for discounts so earned.

(*c*) When a customer is purchasing a quantity of bulk creamed cottage cheese and/or churned buttermilk from two or more distributors which if purchased from a single distributor would entitle him to either or both of the foregoing quantity discounts, he shall be entitled to such discounts from each of such distributors pro rata to the quantities received from each such distributor.

DRY COTTAGE CHEESE

3. The minimum prices for dry cottage cheese, including therein dry curd, special mix and hoop cheese shall be as follows:

	Wholesale	Resale
When Section 1 and revised base prevail	$0. 08	$0. 10
When Section 2 and revised base prevail	. 09	[1]. 11
When Section 3 and revised base prevail	. 10	[1]. 12

[1] Resale prices for hoop cheese shall be two cents more than the corresponding resale prices applicable to dry curd and special mix.

SCHEDULE XI

Cream Jobbing Price Schedule

The following schedule of minimum prices apply to sales by cream jobbers to persons (1) who are engaged principally in the distribution of milk and its products and (2) who have a "creamery operator's" factory license issued by the Department of Agriculture of the State of California. Such schedule shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 1 of Exhibit A and revised base is in effect:

CHURNING CREAM

For each pound of butterfat contained therein add .08¢ to the Los Angeles Market quotation of 92 score butter effective for the day of delivery.

GRADE A CREAM IN TEN-GALLON CANS

For each pound of butterfat contained therein, add to the Los Angeles Market quotation for 92 score butter effective for the date of delivery:

	In weekly quantities of—		
	1–14 cans	15–34 cans	35 cans or over
Raw cream, 38–40 percent	$0. 17	$0. 16	$0. 15
Pasteurized cream, 38–40 percent	. 19	. 18	. 17
Raw cream standardized to other butterfat percentages	. 19	. 18	. 17
Pasteurized cream standardized to other butterfat percentages	. 20	. 19	. 18

SKIM MILK (IN BULK, PER GALLON)

Condensed:	
10 gallons or more in a single delivery	$0. 25
Deliveries of less than 10 gallons	. 30
Not condensed:	
10 gallons or more in a single delivery	. 07
Deliveries of less than 10 gallons	Wholesale prices apply

SCHEDULE XII

Cream Jobbing Price Schedule

The following schedule of minimum prices apply to sales by cream jobbers to persons (1) who are engaged principally in the distribution of milk and its products and (2) who have a "creamery operator's" factory license issued by the Department of Agriculture of the State of California. Such schedule shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 2 of Exhibit A and revised base is in effect:

CHURNING CREAM

For each pound of butterfat contained therein add 10¢ to the Los Angeles quotation for 92 score butter effective for the day of delivery.

GRADE A CREAM IN TEN-GALLON CANS

For each pound of butterfat contained therein add to the Los Angeles Market quotation for 92 score butter effective for the date of delivery.

	In weekly quantities of—		
	1–14 cans	15–34 cans	35 cans or over
Raw cream, 38–40 percent	$0. 20	$0. 19	$0. 18
Pasteurized cream, 38–40 percent	. 22	. 21	. 20
Raw cream standardized to other butterfat percentages	. 22	. 21	. 20
Pasteurized cream standardized to other butterfat percentages	. 23	. 22	. 21

SKIM MILK (IN BULK, PER GALLON)

Condensed:	
10 gallons or more in a single delivery	$0. 30
Deliveries of less than 10 gallons	. 35
Not condensed:	
10 gallons or more in a single delivery	. 08
Deliveries of less than 10 gallons	Wholesale prices apply

SCHEDULE XIII

Cream Jobbing Price Schedule

The following schedules of minimum prices apply to sales by cream jobbers to persons (1) who are engaged principally in the distribution of milk and its products and (2) who have a "creamery operator's" factory license issued by the Department of Agriculture of the State of California. Such schedules shall be in effect when the Los Angeles Market quotation of 92 score butter is such that Section 3 of Exhibit A and revised base is in effect:

CHURNING CREAM

For each pound of butterfat contained therein add 10¢ to the Los Angeles Market quotation for 92 score butter effective for the day of delivery.

GRADE A CREAM IN TEN-GALLON CANS

For each pound of butterfat contained therein add to the Los Angeles Market quotation for 92 score butter effective for the date of delivery.

	In weekly quantities of—		
	1–14 cans	15–34 cans	35 cans or over
Raw cream, 38–40 percent	$0. 24	$0. 23	$0. 22
Pasteurized cream, 38–40 percent	. 26	. 25	. 24
Raw cream standardized to other butterfat percentages	. 26	. 25	. 24
Pasteurized cream standardized to other butterfat percentages	. 27	. 26	. 25

SKIM MILK (IN BULK, PER GALLON)

Condensed:	
10 gallons or more in a single delivery	$0. 32
Deliveries of less than 10 gallons	. 37
Not condensed:	
10 gallons or more in a single delivery	. 09
Deliveries of less than 10 gallons	Wholesale prices apply

SCHEDULE XIV

Prices to Peddlers for Resale

The following minimum prices f. o. b. place of bottling or other packaging shall be charged to peddlers who buy for resale:

	When Sec. 1 of Ex. A and Revised Base is in effect	When Sec. 2 of Ex. A and Revised Base is in effect	When Sec. 3 of Ex. A and Revised Base is in effect
Pasteurized grade A milk:			
3-gallons	$0. 70	$0. 80	$0. 90
2-gallons	. 45	. 55	. 62
1-gallons	. 24	. 28	. 32
Quarts	. 06	. 07	. 08
Pints	. 03	. 04	. 05
Third quarts	. 02½	. 03½	. 04
Half pints	. 02	. 02½	. 03
Grade A raw:			
Quarts	. 06	. 07	. 08
Pints	. 03	. 04	. 05
Third quarts	. 02½	. 03½	. 04
Half pints	. 02	. 02½	. 03
Chocolate drink:			
Quarts	. 06	. 07	. 08
Pints	. 03	. 04	. 05
Third quarts	. 02½	. 03½	. 04
Half pints	. 02	. 02½	. 03
Churned butter milk:			
3-gallons	. 70	. 80	. 90
2-gallons	. 45	. 55	. 65
1-gallons	. 24	. 28	. 32
Quarts	. 06	. 07	. 08
Pints	. 03½	. 04	. 04½
Third quarts	. 03	. 03½	. 04
Half pints	. 02	. 02½	. 03
Guaranteed milk:			
Quarts	. 09	. 10	. 11
Pints	. 05	. 06	. 07
Certified milk, raw:			
Quarts	. 11	. 12	. 13
Pints	. 07	. 08	. 09

	When Sec. 1 of Ex. A and Revised Base is in effect	When Sec. 2 of Ex. A and Revised Base is in effect	When Sec. 3 of Ex. A and Revised Base is in effect
Coffee cream, 22 percent:			
Quarts	$0. 23	$0. 28	$0. 32
Pints	. 14	. 16	. 18
Half pints	. 07	. 08	. 09
Table cream, 27 percent:			
Quarts	. 27	. 32	. 39
Pints	. 16	. 18	. 20
Half pints	. 09	. 10	. 11
Whipping cream, 38 percent:			
Quarts	. 37	. 45	. 50
Pints	. 22	. 25	. 31
Half pints	. 13	. 16	. 17
Sour cream: Half pints	. 07	. 08	. 09
Creamed cottage cheese: Glass, 10 ounces or less	. 09	. 10	. 10
Skim milk: 1 gallon	. 11	. 15	. 20

EXHIBIT C

RULES FOR CONTROL OF PRODUCTION AND ESTABLISHMENT OF SURPLUS PRICE TO PRODUCERS OF GRADE A MARKET MILK

Rules for control of production.—The following rules shall be applicable to all producers of Grade A Market Milk.

1. The term "production base period" as used herein means the period March 16, 1933, to June 15, 1933, both dates inclusive.

2. The term "deliveries" as used herein means any or all of the following:

(*a*) Milk shipped by any producer to any distributor of Grade A Market Milk.

(*b*) Milk shipped by a producer to the surplus plant of Producers Arbitration Committee, Inc.

(*c*) Milk sold by a producer as a distributor either as Grade A Market Milk, or as fluid cream or both.

3. The term "market percentage" means the percentage arrived at by dividing the daily average of the total deliveries of all producers who shipped milk during the production base period *into* the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area during the month of June 1933 as determined by Los Angeles Milk Industry Board.

4. *General bases.*—The established base of each such producer marketing milk in the Los Angeles Sales Area on the effective date of this Agreement who was marketing milk during the entire production base period shall be arrived at as follows: Determine the average daily deliveries of each such producer during the production base period and apply the market percentage thereto. The resulting figure will be the established base of each such producer.

5. *Bases for producers starting deliveries after March 16 but on or before June 15, 1933.*—The established base of each such producer now marketing milk in the Los Angeles Sales Area who commenced to market milk after March 16, 1933, but on or prior to June 15, 1933, shall be arrived at as follows:

A. If any such producer so elects, his deliveries during the portion of the production base period in which he was marketing milk in the Los Angeles Sales Area may be treated as if such deliveries were his total deliveries during the full production base period. Determine the total deliveries of such producer and divide the same by 92, and apply the market percentage against the daily average quantity thus arrived at. The resulting quantity shall be the established base of each such producer.

B. If such producer does not elect to have his base established as provided in paragraph A above, then determine the total deliveries of such producer during a period of 92 days beginning with the date on which he commenced to market milk in the Los Angeles Sales Area and divide such total by 184. The resulting figure will be the established base of such producer.

6. *Bases of producers starting on and after June 16, 1933.*—The established base of each producer now marketing milk in the Los Angeles Sales Area who did not commence to market milk in the Los Angeles Sales Area on or prior to June 15, 1933, or who commences to market milk after the effective date of this Agreement shall be arrived at as follows: Determine the deliveries of such producer during a period of 92 days beginning with the date on which he begins to market milk in the Los Angeles Sales Area and divide the total of such deliveries by 368. The resulting figure will be the established base of such producer. In the case of any such producer whose established base cannot be determined fully as of the last day of any month beginning with the month of October 1933, a temporary established base pending the completion of 92 days of deliveries shall be determined in respect of each calendar month by determining the total deliveries of each producer for the period beginning with the date on which he commenced to market milk in the Los Angeles Sales Area and ending with the last day of such calendar month and dividing such total by four times the number of days included in such period. Such temporary base shall, for all purposes of this agreement, be considered the established base of such producers in respect of any such monthly accounting period.

7. *Adjustments of bases to deliveries.*—Any producer whose daily deliveries for any three consecutive months, excluding months prior to the month of November 1933, is less than 90% of his established base will thereby establish a new base according to his average daily deliveries during such three-month period. The application of this paragraph shall be subject to the provisions of paragraph 9.

8. *"Sales of bases."*—Sales of bases are allowed only in conjunction with the sale of cows and may be apportioned between the buyer and seller in accordance with the number of cows which the buyer has purchased and the number of cows which the seller has retained unsold. The buyer and the seller shall, in case of voluntary sale, jointly sign a statement in writing showing the amount of bases transferred to the buyer and retained by the seller, respectively, which writing shall be filed with the Producers' Arbitration Committee, Inc., within five days from the date of sale. Bases acquired by purchase of cows may be added to existing bases if any exist.

9. *Effect of fire, etc.*—The established base shall remain in effect for a period of three months following the initial test for tuberculosis or for contagious abortion by County, State, or Federal authorities, the loss of barn or herd, or both, by fire or Act of God. The established base shall be retained for a period of 45 days in case deliveries of Grade A Market Milk are shut off or excluded by order of any Board of Health having jurisdiction in the premises and in case of quarantine.

ESTABLISHMENT OF ADJUSTED BASE PRICE

1. Producers' Arbitration Committee, Inc., is operating and will continue to operate a surplus plant to which is delivered all milk from producers in the Los Angeles Milk Shed having established bases in excess of the requirements of distributors in the Los Angeles Sales Area for distribution as fluid milk in said area. Such surplus plant will have the following sources of receipts:

(*a*) The net proceeds arising from the sale of butter and powdered skimmed milk which has been manufactured by it from the butterfat and skimmed milk derived from milk delivered to the surplus plant. (Such net proceeds shall be the gross proceeds less the reasonable cost of operation of the surplus plant and less such amount as the Producers' Arbitration Committee, Inc., shall retain as working capital for the operation of the plant.)

(*b*) The proceeds of such milk delivered to it which it may have, under authority of Producers' Arbitration Committee, Inc., sold in time of shortage to contracting distributors in the Los Angeles Sales Area.

(*c*) The difference between the full base price and the surplus price as determined in accordance with the provisions of Exhibit A, Schedule I, and Exhibit A, Schedule III, which is payable under the provisions of Paragraphs 5 (*a*), 5 (*b*), and 5 (*c*) of this agreement.

2. The surplus plant will be accountable to producers delivering milk to it for the full base price in respect of deliveries not in excess of the individual producer's base, and the surplus price in respect of deliveries in excess of each producer's base. The total of the amounts so to be accounted for shall be computed and from the result of such computation shall be deducted the receipts from the operation of the surplus plant determined in the manner provided in the preceding paragraph. The difference will be the loss to the surplus plant resulting from its operations, to be charged against all deliveries of base milk whether to the surplus plant or to the contracting distributors.

3. The amount of the loss, determined as aforesaid, shall be divided by the total of all delivered base, expressed in terms of pounds of butterfat, whether to contracting distributors or to the surplus plant, the resulting figures being the amount per pound of butterfat which it is necessary to charge back against delivered bases of all producers in order to obtain the adjusted base price.

4. The difference between the full base price determined according to the provisions of Exhibit A, Schedule I, and Exhibit A, Schedule III, and the aforesaid loss per pound of butterfat determined as in the preceding paragraph, shall be the adjusted base price to be paid to all producers, whether delivering to contracting distributors or to the surplus plant, for deliveries not in excess of their respective bases.

5. The difference between the base price and the adjusted base price in respect of the base milk of all producers delivering to contracting distributors which difference is payable to Producers' Arbitration Committee, Inc., in accordance with the provisions of paragraph 5 of this Agreement when added to the similar deduction made directly by the surplus plant in respect of the base milk of all producers delivering to the surplus plant, results in a uniform adjusted base price for deliveries not in excess of base quantities of all producers.

6. Producers' Arbitration Committee, Inc., shall secure the necessary data from the contracting distributors and from the surplus plant, shall compute the foregoing adjustments each month, shall submit a statement containing such adjustments to the Los Angeles Milk Industry Board for its approval, and upon its approval shall notify distributors and producers as to the payments to be made by them respectively in accordance with the foregoing principles. It shall also cause to be paid the adjusted base price and/or surplus price to producers delivering base milk and/or surplus milk to the surplus plant.

7. Any sums deducted by the Producers' Arbitration Committee, Inc., and retained as working capital for the operation of the plant as provided in paragraph 1 of this Exhibit C shall be set up on the books of the Producers' Arbitration Committee, Inc., as a separate fund to the credit of each producer from whom such funds were deducted; and in case of liquidation of Producers' Arbitration Committee, Inc., or discontinuance of business by contributing producers there shall be paid back to each producer the proportion of the total net worth of the Association which his contribution is to the total of all sums so contributed. Producers' Arbitration Committee, Inc., shall develop and make effective a financing plan, with approval of the Los Angeles Milk Industry Board, to cover such deductions for working capital under which monthly deductions and total accumulations will meet the capital needs of the Producers' Arbitration Committee, Inc., without accumulation of unnecessary sums.

8. Producers' Arbitration Committee, Inc., may make such regulations as may be necessary to carry out the operations of the surplus plant and adjustment of prices to producers in accordance with the foregoing principles, such regulations to be subject to the approval of the Los Angeles Milk Industry Board and the Secretary.

9. In the event the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area becomes so decreased or increased as to render impractical, in the opinion of the Los Angeles Milk Industry Board, the accounting for such variations through adjustments in the base price paid producers as provided in paragraph 4, Schedule "C", the Producers' Arbitration Committee, Inc., shall with the approval of the Los Angeles Milk Industry Board and the Secretary, make such uniform increases or decreases, as the case may be, in all existing established bases of producers, as will cause the sum total of all bases adjusted as aforesaid, to again approximate in amount the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area.

EXHIBIT D

LOS ANGELES MILK INDUSTRY BOARD

1. The Los Angeles Milk Industry Board shall be composed of thirteen members all of whose appointments shall be subject to the approval of the Secretary, to wit:

(*a*) Six producers. Five of these shall be selected by the Producers' Arbitration Committee, Inc. (One from each of the following five member associations: California Milk Producers' Association, Independent Milk Producers' Association, Los Angeles County Natural Milk Producers' Association, Los Angeles Mutual Dairymen's Association, Southern California Bottled Raw Milk Association.) The sixth producer shall be selected by producers not members of the five associations of producers mentioned above, provided, however, that if such producers have not selected a member within five days after the effective date of this License, Producers' Arbitration Committee, Inc., shall select such sixth member from among producers not members of any of the aforementioned five associations.

(*b*) Six distributors. Four of them shall be selected by the Southern California Milk Dealers' Association. One of these shall be selected by the Independent Milk Distributors' Association, Inc. The sixth distributor shall be selected by distributors not members of either of said associations, provided however, that if such distributors shall not have selected a member within five days after the effective date of this License, the five distributor members selected as above provided shall select such sixth member.

(*c*) The thirteenth member shall be selected by two-thirds vote of the twelve selected as specified in (*a*) and (*b*) above and such thirteenth member shall be the Chairman of the Board.

2. The duties of the Los Angeles Milk Industry Board in addition to those specifically set forth elsewhere in this License shall be to compile statistics and make surveys of costs and methods of production and distribution in the Los Angeles market, either alone or in collaboration with other agencies engaged in similar projects; to formulate a program for improving the quality of milk and the standards of the Industry generally in the Los Angeles market; to arbitrate disputes and to engage in advertising and sales promotion work which will further the interests of the industry.

(*a*) Subject to the approval of the Secretary, the Los Angeles Milk Industry Board may make such further rules, regulations and/or arrangements, not inconsistent with this License or with those which have been established by the Secretary, as may be necessary to carry out the plans and principles set forth in this License.

3. In the exercise of any powers or duties under this License—

(*a*) The Los Angeles Milk Industry Board shall not be liable for any damages caused by any acts or omissions of its members, whether acting individually or collectively as a Board.

(*b*) No member of Los Angeles Milk Industry Board shall be liable for any damages caused by the acts or omissions of any other member.

(*c*) No member shall be liable for any damages caused by his own acts or omissions, unless such acts or omissions involve fraud or willful misconduct on the part of such member.

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EXHIBIT E

RULES OF FAIR PRACTICE

The following practices are considered unfair and shall not be engaged in by distributors or by their officers, employees, or agents:

(1) Any method or device whereby fluid milk is sold or offered for sale at a price less than stated in this License, whether by any discount, rebate, free service, merchandise, advertising, allowance, credit for bulk fluid milk returned, loans or credits outside of the usual course of business or other valuable consideration or combined price for such milk together with another commodity sold or offered for sale, whether separately or otherwise, or whereby a subsidy is given for either business or information or assistance in procuring business; or whereby business is obtained, or sought to be obtained, by misrepresentation as to any article listed in Exhibit B.

(2) For any distributor (a) to sell any fluid milk in a territory which within one year last past has been covered by him in any capacity for another distributor or (b) to cause to be sold through an agent or employee fluid milk in any territory which such agent or employee has within one year last past covered in any capacity for another distributor.

(3) The failure of any distributor to invoice daily 3¢ per bottle for any bottle difference, over or under, for any milk delivery at any wholesale stop, or to settle for the same when the milk is paid for.

EXHIBIT F

CREAM-BUYING PLAN

1. The plants of the distributors located in the counties listed in Exhibit A, Schedule II, shall take delivery for distribution as Grade A Market Cream only of Grade A milk which is delivered from producers in the Los Angeles Cream shed. Such producers for the present are not to receive bases but shall be subject to the provisions of this cream-buying plan.

2. There shall be an adjustment in each month for deliveries of milk for Grade A Market Cream by each producer, according to the quality thereof, the deductions to be made from each producer not delivering milk of the highest quality as set forth in Schedule I of this exhibit. The total deductions thus made shall be charged against each producer incurring said penalty and the total of all such deductions shall be handled in the following manner:

(*a*) If there be no surplus of deliveries of Grade A Milk for Grade A Market Cream above the purchases of Grade A Market Cream by distributors, in the Los Angeles Sales Area, then the total penalties shall be prorated back to the producers, including those who incurred the penalties, in proportion to the number of pounds of butterfat delivered by them to said plants, respectively.

The foregoing adjustment shall be computed for each month by the accountants of the Los Angeles Cream Clearing Association, who shall secure the necessary data from the several plants and notify them, respectively, of the resulting price adjustments to be made in the case of each producer delivering milk to each such plant for Grade A Market Cream.

(*b*) If there be a surplus of such deliveries to the plants over the aforesaid requirements of distributors in the Los Angeles Sales Area, then the total amount of the penalties shall be added to the returns received from surplus products as provided in the next succeeding paragraph.

If at any time there be an excess of such deliveries of milk to the plants over the Grade A Market Cream requirements of the distributors in the Los Angeles Sales Area, the plant or plants having such excess, shall manufacture such excess over requirements into butter or other milk products. The plants disposing of deliveries of milk in the foregoing manner shall be entitled to be reimbursed for the loss sustained (that is to say, the difference between the minimum price which they are obligated to pay producers for said milk in accordance with the provisions of this cream-buying plan, exclusive of penalties, and the gross proceeds of manufacturing such milk into butter and powdered skim). Such plants shall report the results of such manufacturing operations to the accountants, who shall cause such plants to be reimbursed out of any penalties incurred by the producers

under the provisions of the foregoing paragraph. If such penalties are not sufficient to fully reimburse such plants, the difference shall be charged back against all producers delivering milk for Grade A Market Cream to all the plants, prorate, in accordance with their deliveries of such milk during such month. If there be any balance of penalties after reimbursing the plants disposing of milk in manufactured products as aforesaid, the remaining balance of such penalties shall be prorated back to the individual producers in a manner similar to that provided in the preceding paragraph. The foregoing adjustment shall be computed for each month by the accountants of the Los Angeles Cream Clearing Association who shall secure the necessary data from the several plants and shall notify them, respectively, of resulting price adjustments to be made in the case of each producer and of the amount to be paid to the plant or plants entitled to reimbursement.

3. The expenses of the said accountants including reasonable compensation for their services incurred in the operation of the Cream Buying Plan shall be prorated back to producers of milk for Grade A Market Cream delivering to the aforesaid plants, in proportion to the number of pounds of butterfat delivered by such producers. Such pro rata charges shall be collected by said plants from such producers supplying them and the moneys so collected paid to the accountants.

SCHEDULE I

The specifications for each class of milk for Grade A Market Cream and the deduction applicable to the several classes are as follows:

CLASS I MILK

Flavor and Odor—No. 1 or No. 2 rating.

Must be refrigerated except when delivered to plants in Santa Barbara County.

Bacterial count shall not exceed 25,000 per c.c.

If the milk has a flavor rating of No. 3, there shall be a deduction of 2 cents per pound of butterfat.

CLASS II MILK

Flavor and Odor—No. 1 or No. 2 rating.

Bacterial count shall not exceed 25,000 per c.c.

Class II milk shall be paid for at 1 cent less per pound of butterfat than Class I milk.

If the milk has a flavor rating of No. 3, there shall be a further deduction of 2 cents per pound of butterfat.

CLASS III MILK.

Flavor and Odor—No. 1 or No. 2 rating.

Bacterial count shall not exceed 50,000 per c.c.

Class III milk shall be paid for at 2 cents less per pound of butterfat than Class I milk.

If the milk has a flavor rating of No. 3 there shall be a further deduction of 2 cents per pound of butterfat.

Class IV Milk

Flavor and Odor—No. 1 or No. 2 rating.

Bacterial count shall not exceed 150,000 per c.c.

Class IV milk shall be paid for at 4 cents less per pound of butterfat than Class I milk.

If the milk has a flavor rating of No. 3, there shall be a further deduction of 2 cents per pound of butterfat.

EXHIBIT C

RULES FOR CONTROL OF PRODUCTION AND ESTABLISHMENT OF SURPLUS PRICE TO PRODUCERS OF GRADE A MARKET MILK

Rules for Control of Production. The following rules shall be applicable to all producers of Grade A Market Milk.

1. The term "production base period" as used herein means the period March 16, 1933 to June 15, 1933 both dates inclusive.

2. The term "deliveries" as used herein means any or all of the following:

(a) Milk shipped by any producer to any distributor of Grade A Market Milk,

(b) Milk shipped by a producer to the surplus plant of Producers Arbitration Committee, Inc.

(c) Milk sold by a producer as a distributor either as Grade A Market Milk or as fluid cream or both.

3. The term "market percentage" means the percentage arrived at by dividing the daily average of the total deliveries of all producers who shipped milk during the production base period into the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area during the month of June, 1933, as determined by Los Angeles Milk Industry Board.

4. General Bases. The established base of each such producer marketing milk in the Los Angeles Sales Area on the effective date of this Agreement who was market-

ing milk during the entire production base period shall be arrived at as follows: Determine the average daily deliveries of each such producer during the production base period and apply the market percentage thereto. The resulting figure will be the established base of each such producer.

5. Bases for Producers Starting Deliveries After March 16 But On Or Before June 15, 1933. The established base of each such producer now marketing milk in the Los Angeles Sales Area who commenced to market milk after March 16, 1933, but on or prior to June 15, 1933, shall be arrived at as follows:

A. If any such producer so elects, his deliveries during the portion of the production base period in which he was marketing milk in the Los Angeles Sales Area may be treated as if such deliveries were his total deliveries during the full production base period. Determine the total deliveries of such producer and divide the same by 92, and apply the market percentage against the daily average quantity thus arrived at. The resulting quantity shall be the established base of each such producer.

B. If such producer does not elect to have his base established as provided in paragraph A. above, then determine the total deliveries of such producer during a period of 92 days beginning with the date on which he commenced to market milk in the Los Angeles Sales Area and divide such total by 184. The resulting figure will be the established base of such producer.

6. Bases of Producers Starting On and After June 16, 1033. The established base of each producer now marketing milk in the Los Angeles Sales Area

who did not commence to market milk in the Los Angeles Sales Area on or prior to June 15, 1933, or who commences to market milk after the effective date of this Agreement shall be arrived at as follows: Determine the deliveries of such producer during a period of 92 days beginning with the date on which he begins to market milk in the Los Angeles Sales Area and divide the total of such deliveries by 368. The resulting figure will be the established base of such producer. In the case of any such producer whose established base cannot be determined fully as of the last day of any month beginning with the month of October, 1933, a temporary established base pending the completion of 92 days of deliveries shall be determined in respect of each calendar month by determining the total deliveries of each producer for the period beginning with the date on which he commenced to market milk in the Los Angeles Sales Area and ending with the last day of such calendar month and dividing such total by four times the number of days included in such period. Such temporary base shall, for all purposes of this agreement be considered the established base of such producers in respect of any such monthly accounting period.

7. Adjustments of Bases to Deliveries. Any producer whose daily deliveries for any three consecutive months excluding months prior to the month of November, 1933, is less than 90% of his established base will thereby establish a new base according to his average daily deliveries during such three month period. The application of this paragraph shall be subject to the provisions of paragraph 9.

8. "Sales of Bases." Sales of bases are allowed only in conjunction with the sale of cows and may be apportioned between the buyer and seller in accordance with the number of cows which the buyer has purchased and the number of cows which the seller has retained unsold. The buyer and the seller shall, in case of voluntary sale, jointly sign a statement in writing showing the amount of bases transferred to the buyer and retained by the seller, respectively, which writing shall be filed with the Producers' Arbitration Committee, Inc., within five days from the date of sale. Bases acquired by purchase of cows may be added to existing bases if any exist.

9. Effect of Fire, Etc. The established base shall remain in effect for a period of three months following the initial test for tuberculosis or for contagious abortion by County, State or Federal authorities, the loss of barn or herd, or both, by fire or Act of God. The established base shall be retained for a period of 45 days in case deliveries of Grade A Market Milk are shut off or excluded by order of any Board of Health having jurisdiction in the premises and in case of quarantine.

Establishment of Adjusted Base Price.

1. Producers' Arbitration Committee, Inc., is operating and will continue to operate a surplus plant to which is delivered all milk from producers in the Los Angeles Milk Shed having established bases in excess of the requirements of contracting distributors in the Los Angeles Sales Area for distribution as fluid milk in said area. Such surplus plant will have the following sources of receipts:

(a) The net proceeds arising from the sale of butter and powdered skimmed milk which has been manufactured by it from the butter fat and skimmed milk derived from milk delivered to the surplus plant. (Such net proceeds shall be the gross proceeds less the reasonable cost of operation of the surplus plant and less such amount as the Producers' Arbitration Committee, Inc., shall retain as working capital for the operation of the plant.)

(b) The proceeds of such milk delivered to it which it may have, under authority of Producers' Arbitration Committee, Inc., sold in time of shortage to contracting distributors in the Los Angeles Sales Area.

(c) The difference between the full base price and the surplus price as determined in accordance with the provisions of Exhibit A, Schedule I, and Exhibit A, Schedule III, which is payable under the provisions of Paragraph 5 (a), 5 (b), and 5 (c) of this agreement.

2. The surplus plant will be accountable to producers delivering milk to it for the full base price in respect of deliveries not in excess of the individual producer's base, and the surplus price in respect of deliveries in excess of each producer's base. The total of the amounts so to be accounted for shall be computed and from the result of such computation shall be deducted the receipts from the operation of the surplus plant determined in the manner provided in the preceding paragraph. The difference will be the loss to the surplus plant resulting

from its operations, to be charged against all deliveries of base milk whether to the surplus plant or to the contracting distributors.

3. The amount of the loss, determined as aforesaid, shall be divided by the total of all delivered base, expressed in terms of pounds of butterfat, whether to contracting distributors or to the surplus plant, the resulting figures being the amount per pound of butter fat which it is necessary to charge back against delivered bases of all producers in order to obtain the adjusted base price.

4. The difference between the full base price determined according to the provisions of Exhibit A, Schedule I, and Exhibit A, Schedule III, and the aforesaid loss per pound of butterfat determined as in the preceding paragraph, shall be the adjusted base price to be paid to all producers, whether delivering to contracting distributors or to the surplus plant, for deliveries not in excess of their respective bases.

5. The difference between the base price and the adjusted base price in respect to the base milk of all producers delivering to contracting distributors which difference is payable to Producers' Arbitration Committee, Inc., in accordance with the provisions of paragraph 5 of this Agreement when added to the similar deduction made directly by the surplus plant in respect of the base milk of all producers delivering to the surplus plant, results in a uniform adjusted base price for deliveries not in excess of base quantities of all producers.

6. Producers' Arbitration Committee, Inc., shall secure the necessary data from the contracting distribu-

tors and from the surplus plant, shall compute the foregoing adjustments each month, shall submit a statement containing such adjustments to the Los Angeles Milk Industry Board for its approval, and upon its approval shall notify distributors and producers as to the payments to be made by them respectively in accordance with the foregoing principles. It shall also cause to be paid the adjusted base price and/or surplus price to producers delivering base milk and/or surplus milk to the surplus plant.

7. Any sums deducted by the Producers' Arbitration Committee, Inc. and retained as working capital for the operation of the plant as provided in paragraph 1 of this Exhibit C shall be set up on the books of the Producers' Arbitration Committee, Inc. as a separate fund to the credit of each producer from whom such funds were deducted; and in case of liquidation of Producers' Arbitration Committee, Inc. or discontinuance of business by contributing producers there shall be paid back to each producer the proportion of the total net worth of the Association which his contribution is to the total of all sums so contributed. Producers' Arbitration Committee, Inc., shall develop and make effective a financing plan, with approval of the Los Angeles Milk Industry Board, to cover such deductions for working capital under which monthly deductions and total accumulations will meet the capital needs of the Producers' Arbitration Committee, Inc. without accumulation of unnecessary sums.

8. Producers' Arbitration Committee, Inc. may make such regulations as may be necessary to carry out the operations of the surplus plant and adjustment of prices

to producers in accordance with the foregoing principles, such regulations to be subject to the approval of the Los Angeles Milk Industry Board and the Secretary.

9. In the event the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area becomes so decreased or increased as to render impractical, in the opinion of the Los Angeles Milk Industry Board, the accounting for such variations through adjustments in the base price said producers as provided in paragraph 4, Schedule "C," the Producers' Arbitration Committee, Inc. shall with the approval of the Los Angeles Milk Industry Board and the Secretary, make such uniform increases or decreases, as the case may be, in all existing established bases of producers, as will cause the sum total of all bases adjusted as aforesaid, to again approximate in amount the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area.

EXHIBIT D

LOS ANGELES MILK INDUSTRY BOARD

1. The Los Angeles Milk Industry Board shall be composed of thirteen members all of whose appointments shall be subject to the approval of the Secretary, to wit:

(a) Six producers. Five of these shall be selected by the Producers' Arbitration Committee, Inc. (One from each of the following five member associations:—California Milk Producers' Association, Independent Milk Producers' Association, Los Angeles County Natural Milk Producers' Association, Los Angeles Mutual

Dairymen's Association, Southern California Bottled Raw Milk Association). The sixth producer shall be selected by producers not members of the five associations of producers mentioned above, provided, however, that if such producers have not selected a member within five days after the effective date of this Agreement, Producers' Arbitration Committee, Inc., shall select such sixth member from among producers not members of any of the aforementioned five associations.

(b) Six distributors. Four of these shall be selected by the Southern California Milk Dealers Association. One of these shall be selected by the Independent Milk Distributors Association, Inc. The sixth distributor shall be selected by distributors not members of either of said association, provided, however, that if such distributors shall not have selected a member within five days after the effective date of this Agreement, the five distributor members selected as above provided shall select such sixth member.

(c) The thirteenth member shall be selected by two-thirds vote of the twelve selected as specified in (a) and (b) above and such thirteenth member shall be the Chairman of the Board.

2. The duties of the Los Angeles Milk Industry Board in addition to those specifically set forth elsewhere in this Agreement shall be to compile statistics and make surveys of costs and methods of production and distribution in the Los Angeles market, either alone or in collaboration with other agencies engaged in similar projects; to formulate a program for improving the quality of milk and the standards of the Industry generally in the Los Angeles market; to arbitrate disputes

and to engage in advertising and sales promotion work which will further the interests of the industry.

(a) Subject to the approval of the Secretary, the Los Angeles Milk Industry Board may make such further rules, regulations and/or arrangements, not inconsistent with this Agreement or with those which have been established by the Secretary, as may be necessary to carry out the plans and principles set forth in this Agreement.

3. In the exercise of any powers or duties under this Agreement:

(a) The Los Angeles Milk Industry Board shall not be liable for any damage caused by any acts or omissions of its members, whether acting individually or collectively as a Board.

(b) No member of Los Angeles Milk Industry Board shall be liable for any damages caused by the acts or omissions of any other member.

(c) No member shall be liable for any damages caused by his own acts or omissions, unless such acts or omissions involve fraud or willful misconduct on the part of such member.

EXHIBIT E

RULES OF FAIR PRACTICES

The following practices are considered unfair and shall not be engaged in by contracting distributors or by their officers, employees or agents:

(1) Any method or device whereby fluid milk is sold or offered for sale at a price less than stated in this agreement, whether by any discount, rebate, free service, merchandise, advertising allowance, credit for bulk fluid

milk returned, loans or credits outside of the usual course of business or other valuable consideration or combined price for such milk together with another commodity sold or offered for sale, whether separately or otherwise, or whether a subsidy is given for either business or information or assistance in procuring business; or whereby business is obtained, or sought to be obtained, by misrepresentation as to any article listed in Exhibit B.

(2) For any contracting Distributor (a) to sell any fluid milk in a territory which within one year last past has been covered by him in any capacity for another distributor or (b) to cause to be sold through an agent or employee fluid milk in any territory which such agent or employee has within one year last past covered in any capacity for another distributor.

(3) The failure of any contracting distributor to invoice daily 3c per bottle for any bottle difference, over or under, for any milk delivery at any wholesale stop, or to settle for the same when the milk is paid for.

EXHIBIT "F"

CREAM BUYING PLAN

1. The plants of the contracting distributors located in the counties listed in Exhibit "A," Schedule II, shall take delivery for distribution as Grade A Market Cream only of Grade "A" milk which is delivered from producers in the Los Angeles Cream Shed. Such producers for the present are not to receive bases but shall be subject to the provisions of this cream buying plan.

2. There shall be an adjustment in each month for deliveries of milk for Grade A Market Cream by each

producer, according to the quality thereof, the deductions to be made from each producer not delivering milk of the highest quality as set forth in Schedule I of this exhibit. The total deductions thus made shall be charged against each producer incurring said penalty and the total of all such deductions shall be handled in the following manner:

(a) If there be no surplus of deliveries of Grade A Milk for Grade A Market Cream above the purchases of Grade A Market Cream by distributors, in the Los Angeles Sales Area, then the total penalties shall be pro rated back to the producers, including those who incurred the penalties, in proportion to the number of pounds of butter fat delivered by them to said plants, respectively.

The foregoing adjustment shall be computed for each month by the accountants of the Los Angeles Cream Clearing Association, who shall secure the necessary data from the several plants and notify them, respectively, of the resulting price adjustments to be made in the case of each producer delivering milk to each such plant for Grade A Market Cream.

(b) If there be a surplus of such deliveries to the plants over the aforesaid requirements of contracting distributors in the Los Angeles Sales Area, then the total amount of the penalties shall be added to the returns received from surplus products as provided in the next succeeding paragraph.

If at any time there be an excess of such deliveries of milk to the plants over the Grade A Market Cream requirements of the contracting distributors in the Los Angeles Sales Area, the plant or plants having such

excess, shall manufacture such excess over requirements into butter or other milk products. The plants disposing of deliveries of milk in the foregoing manner shall be entitled to be reimbursed for the loss sustained (that is to say, the difference between the minimum price which they are obligated to pay producers for said milk in accordance with the provisions of this cream buying plan, exclusive of penalties, and the gross proceeds of manufacturing such milk into butter and powdered skim). Such plants shall report the results of such manufacturing operations to the accountants, who shall cause such plants to be reimbursed out of any penalties incurred by the producers under the provisions of the foregoing paragraph. If such penalties are not sufficient to fully reimburse such plants, the difference shall be charged back against all producers delivering milk for Grade A Market Cream to all the plants, pro rata, in accordance with their deliveries of such milk during such month. If there be any balance of penalties after reimbursing the plants disposing of milk in manufactured products as aforesaid, the remaining balance of such penalties shall be pro rated back to the individual producers in a manner similar to that provided in the preceding paragraph. The foregoing adjustment shall be computed for each month by the accountants of the Los Angeles Cream Clearing Association who shall secure the necessary data from the several plants and shall notify them, respectively, of resulting price adjustments to be made in the case of each producer and of the amount to be paid to the plant or plants entitled to reimbursement.

3. The expenses of the said accountants including reasonable compensation for their services incurred in

the operation of the Cream Buying Plan shall be prorated back to producers of milk for Grade A Market Cream delivering to the aforesaid plants, in proportion to the number of pounds of butterfat delivered by such producers. Such pro rata charges shall be collected by said plants from such producers supplying them and the moneys so collected paid to the accountants.

EXHIBIT "F"

SCHEDULE 1

The specifications for each class of milk for Grade A Market Cream and the deduction applicable to the several classes are as follows:

CLASS I MILK

Flavor and Odor—No. 1 or No. 2 rating.

Must be refrigerated except when delivered to plants in Santa Barbara County.

Bacterial count shall not exceed 25,000 per c.c.

If the milk has a flavor rating of No. 3, there shall be a deduction of 2 cents per pound of butterfat.

CLASS II MILK

Flavor and Odor—No. 1 or No. 2 rating.

Bacterial count shall not exceed 25,000 per c.c.

Class II milk shall be paid for at 1 cent less per pound of butterfat than Class I milk.

If the milk has a flavor rating of No. 3, there shall be a further deduction of 2 cents per pound of butterfat.

CLASS III MILK

Flavor and Odor—No. 1 or No. 2 rating.

Bacterial count shall not exceed 50,000 per c.c.

Class III milk shall be paid for at 2 cents less per pound of butterfat than Class I milk.

If the milk has a flavor rating of No. 3 there shall be a further deduction of 2 cents per pound of butterfat.

CLASS IV MILK

Flavor and Odor—No. 1 or No. 2 rating.

Bacterial count shall not exceed 150,000 per c.c.

Class IV milk shall be paid for at 4 cents less per pound of butterfat than Class I milk.

If the milk has a flavor rating of No. 3, there shall be a further deduction of 2 cents per pound of butterfat.

It is agreed between the contracting producers and the contracting distributors that any quality program for milk for Grade A Market Milk which might be developed by them through the Los Angeles Milk Industry Board and submitted to the Secretary for approval shall not be less stringent than that established herein for milk for Grade A Market Cream.

Since correction of typographical errors may be necessary before signature by the Secretary, you are requested to authorize by signing this authorization.

We, the undersigned, hereby authorize

T. R. Knudsen and Earl Maharg

to consent to the correction of any typographical errors which the Agricultural Adjustment Administration may consider it advisable to make in the Marketing Agree-

ment for milk, Los Angeles Milk Shed, which we have signed on the.....day of.....1933.

.....

Date..... By.....

Title

State of California, County of Los Angeles—ss.

B. FRATKIN, being first duly sworn, deposes and says: That he is the President of VALLEY DAIRY CO., Inc., a corporation, one of the Plaintiffs herein, and that he therefore verifies the foregoing Complaint on behalf of said plaintiffs; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true.

B. FRATKIN.

Subscribed and sworn to before me this 11th day of January, 1934.

(SEAL) STANLEY F. MAURSETH,
Notary Public in and for the County
and State aforesaid.

[Endorsed]: Complaint-Bill for Injunction. Filed Jan. 11, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

Lewis D. Collings, Amos Friedman, Walter F. Haas, Harold C. Johnston, Edward M. Selby, William T. Selby, Attorneys for Plaintiffs.

[Title of Court and Cause]

In Equity No. 144-C

NOTICE OF MOTION

To the Defendants: Harry W. Berdie, and to his attorneys William H. Neblett and Frank G. Swain: and to the Defendants Los Angeles Milk Industry Board, Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins, Ross Weaver, and to their attorneys, E. H. Whitcombe, Farrand & Slosson and B. Dean Clanton, and to the defendants Milk Producers, Inc., a California corporation, Anders Larsen, H. C. Darger and Pierson M. Hall, as United States District Attorney for the Southern District of California:

You and Each of You will please take notice that the plaintiffs will present to His Honor, George Cosgrave, Judge of the District Court of the United States for the Southern District of California, Central Division, at the court room of said Judge in the Federal Building, Temple and Main Streets, Los Angeles, California, on the 20th day of August, A. D. 1934, at the hour of ten o'clock A. M., of said day, or as soon thereafter as counsel may be heard, a motion, a copy of which is hereto attached, praying for permission to file a Supplemental Bill in the above cause and upon the grounds therein stated.

ment for milk, Los Angeles Milk Shed, which we have signed on the.....day of.....1933.

.....

Date..... By.....

Title

State of California, County of Los Angeles—ss.

B. FRATKIN, being first duly sworn, deposes and says: That he is the President of VALLEY DAIRY CO., Inc., a corporation, one of the Plaintiffs herein, and that he therefore verifies the foregoing Complaint on behalf of said plaintiffs; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true.

B. FRATKIN.

Subscribed and sworn to before me this 11th day of January, 1934.

(SEAL) STANLEY F. MAURSETH,
Notary Public in and for the County
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[Endorsed]: Complaint-Bill for Injunction. Filed Jan. 11, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

Lewis D. Collings, Amos Friedman, Walter F. Haas, Harold C. Johnston, Edward M. Selby, William T. Selby, Attorneys for Plaintiffs.

[Title of Court and Cause]

In Equity No. 144-C

NOTICE OF MOTION

To the Defendants: Harry W. Berdie, and to his attorneys William H. Neblett and Frank G. Swain: and to the Defendants Los Angeles Milk Industry Board, Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins, Ross Weaver, and to their attorneys, E. H. Whitcombe, Farrand & Slosson and B. Dean Clanton, and to the defendants Milk Producers, Inc., a California corporation, Anders Larsen, H. C. Darger and Pierson M. Hall, as United States District Attorney for the Southern District of California:

You and Each of You will please take notice that the plaintiffs will present to His Honor, George Cosgrave, Judge of the District Court of the United States for the Southern District of California, Central Division, at the court room of said Judge in the Federal Building, Temple and Main Streets, Los Angeles, California, on the 20th day of August, A. D. 1934, at the hour of ten o'clock A. M., of said day, or as soon thereafter as counsel may be heard, a motion, a copy of which is hereto attached, praying for permission to file a Supplemental Bill in the above cause and upon the grounds therein stated.

That said motion is made upon the files and records of the within action, including the verified Bill of Complaint heretofore filed herein, and upon a Supplemental Complaint, a verified copy of which is attached hereto as aforesaid.

Dated: August 9th, 1934.

EDWARD M. SELBY
Edward M. Selby
LEWIS D. COLLINGS
Lewis D. Collings
WALTER F. HAAS
Walter F. Haas
H. C. JOHNSTON
H. C. Johnston
Attorneys for Plaintiffs

(Endorsed): Notice of Motion. Filed Aug. 11, 1934, R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

In Equity No. 144-C

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BILL OF COMPLAINT FOR INJUNCTION.

COME Now the plaintiffs and move the above entitled court for leave to file a Supplemental Bill of Complaint for Injunction herein, and respectively show as follows, to-wit:

That on the 11th day of January, 1934, the said plaintiffs filed their Bill in this Honorable Court against the defendants herein for the purpose of having the said court adjudge and decree that License for Milk, Los

Angeles Milk Shed, License No. 17, issued by the Secretary of Agriculture of the United States on November 16th, 1933 and by authority of an Act known as the National Agricultural Adjustment Act, being the Act of May 12th, 1933, Chapter 25, 48 Statutes, 73 Congress H. R. 3635 of the United States of America, and regulations issued thereunder by the Secretary of Agriculture on July 22nd, 1933, was void and invalid as to the said plaintiffs, and that the said National Agricultural Adjustment Act, the said regulations thereunder, the operations thereof and the enforcement thereof, declared void and invalid as to these defendants, and further praying that the said court at once issue a restraining order enjoining the defendants, and each of them, from making any of the demands and committing any of the acts with relation to the said plaintiffs, as set forth in said Bill of Complaint, and from taking any steps whatsoever to collect from the said plaintiffs the payments mentioned in said complaint and claimed due from the plaintiffs by the defendants under and by virtue of the terms and provisions of said License, and ordering said defendants to show cause why a temporary injunction of like character should not issue, and praying that upon the hearing of said order to show cause a temporary injunction of like character issue, and that upon final hearing said temporary injunction be made permanent, and further praying that this Honorable Court adjudge and decree that said purported License No. 17 is void and invalid as to these plaintiffs.

That the defendants Harry W. Berdie, Los Angeles Milk Industry Board, Milk Producers, Inc., a California

Corporation, Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins and Ross Weaver, appeared and answered by sworn affidavits and later by verified answer, denying each and every of the material allegations of said Bill of Complaint, affirmatively contending that said License and said National Agricultural Adjustment Act were valid, that the payments sought to be collected thereunder from these plaintiffs were proper, that no Injunction should issue and that they did not intend to enforce by revocation of License or imposition of penalties the said License as against the said plaintiffs.

That since the filing of said suit and at the instance of the said defendants, the Secretary of Agriculture, purporting to act under the authority of said National Agricultural Adjustment Act, instituted proceedings to terminate said License No. 17 as to the plaintiffs and each of them for alleged violations of said License, consisting of among other things, the failure to make payments required by said License and specified in the Bill of Complaint on file herein, and thereafter revoked said License as to all Licensees, issued a new license known as No. 57 purporting to license all distributors of milk in the said Los Angeles Sales Area, among whom are the plaintiffs, and thereafter revoked said License No. 57 as to the said plaintiffs and each of them because of such alleged violations. That since the filing of said Bill

of Complaint as aforesaid, the said defendants, Los Angeles Milk Industry Board and the individual defendant members thereof, and the defendant Milk Producers, Inc., has demanded from the plaintiffs and each of them further payments and sums of money, claiming the same under the terms of said License No. 17, and has threatened to proceed further to attempt to collect the same from said plaintiffs and each of them, and said Milk Producers, Inc., has brought suit in the Superior Court against the plaintiff Lucerne Cream and Butter Company, a corporation, for such collection thereof, and threatens to bring similar suits against the other plaintiffs and each of them for such collection. That the said defendant H. C. Darger is the Milk Administrator appointed by said Secretary of Agriculture under said License No. 57, and has made demands upon the plaintiffs and each of them for payments of various sums of money under the terms and provisions of said License No. 57. That the defendant Anders Larsen is the Enforcement Officer of the Agricultural Adjustment Administration of the United States Department of Agriculture, appointed as such by the Secretary of Agriculture, and claims the right and power of enforcement of the provisions of said Licenses No. 17 and No. 57. That the said defendant Pierson M. Hall is the duly appointed, qualified and acting United States District Attorney for the Southern District of California, and the person designated by the terms and provisions of the Agricultural Adjustment Act to institute proceedings to enforce the remedies and collect the forfeitures provided for or pursuant to said Act. That all of said matters, among

other things, appear in the Supplemental Bill of Complaint of said defendants, a verified copy of which is attached hereto and made a part hereof as is fully set forth herein.

That your petitioners are advised that it is necessary to file a Supplemental Bill of Complaint, as attached hereto as aforesaid, herein and to bring in the defendants Anders Larsen, H. C. Darger, and Pierson M. Hall, sued herein as fictitious defendants, as defendants herein, to the original Bill of Complaint and the said Supplemental Bill of Complaint, and pray that your petitioners, plaintiffs, herein, be granted leave to file said Supplemental Bill for the purposes of stating facts and matters relevant herein and occuring since the filing of the original Bill as against all defendants, including the defendants Anders Larsen, H. C. Darger and Pierson M. Hall, as United States District Attorney for the Southern District of California, and for such other general and special relief as may be proper.

That said motion is made upon the files and records of the within action, including the verified Bill of Complaint heretofore filed herein, and upon a Supplemental Complaint, a verified copy of which is attached hereto as aforesaid.

EDWARD M. SELBY
Edward M. Selby
LEWIS D. COLLINGS
Lewis D. Collings
WALTER F. HAAS
Walter F. Haas
H. C. JOHNSTON
H. C. Johnston
Attorneys for Plaintiffs

(Endorsed): Filed, Aug. 9, 1934, R. S. Zimmerman, Clerk, by L. Wayne Thomas, Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 4th day of September in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable Geo. Cosgrave, District Judge.

Charles J. Kurtz, etc. Plaintiff,

vs.

Harry W. Berdie, et al. Defendants.

No. Eq.-144-C.

This cause coming before the Court, at this time, for hearing on:

(1) Order to Show Cause and Restraining Order, filed August 9th, 1934, on Supplemental Bill in Equity of plaintiffs, directed to defendants to show cause why a Temporary Injunction should not issue, etc.;

(2) Motion of Harry W. Berdie, for himself alone, for an Order vacating or dissolving the Temporary Restraining Order issued on August 9th, 1934, pursuant to Notice filed August 29th, 1934, and for an Order Dismissed the above entitled proceedings, pursuant to Notice filed August 29th, 1934;

(3) Motion of defendants, Los Angeles Milk Industry Board, et al. for an Order vacating or dissolving the

Temporary Restraining Order, issued on August 9th, 1934, pursuant to Notice filed August 28th, 1934, and for an Order Dismissing the above entitled proceedings, pursuant to Notice filed August 28th, 1934;

(4) Motion of defendant Milk Producers, Inc., a California corporation, for an order vacating or dissolving the Temporary Restraining Order issued by this Court on August 9th, 1934, pursuant to Notice filed August 28th, 1934, and for an Order Dismissing the above entitled proceedings, pursuant to Notice filed August 28th, 1934; and,

(5) Motion of Anders Larsen, et al., for an Order vacating or dissolving the Temporary Restraining Order issued by this Court on August 9th, 1934, pursuant to Notice filed September 1st, 1934;

Lewis D. Collings, Harold C. Johnston and Edward M. Selby, Esqs., appearing for the plaintiffs; Peirson M. Hall, U. S. Attorney, and Clyde Thomas, Assistant U. S. Attorney, appearing for defendants Harry W. Berdie, Anders Larsen, H. C. Darger and Peirson M. Hall; Leonard B. Slosson, Esq., of the law firm of Messrs. Farrand & Slosson, appearing for defendants Los Angeles Milk Industry Board, et al. and for defendant Milk Producers, Inc., a California corporation; and, there being no court reporter present, it appears to the Court that on September 1st, 1934, Objections to the Application of the plaintiffs for a Preliminary Injunction, and to the Application of the plaintiffs for leave to file Supplemental Bill of Complaint were filed by Anders Larsen, H. C. Darger and Peirson M. Hall, the said H. C. Johnston, Esq., argues to the Court in sup-

port of the plaintiffs' Application to file said Supplemental Bill of Complaint, following which Leonard B. Slosson and Peirson M. Hall, Esqs., in behalf of their clients, argue to the Court, respectively, in opposition to the Motion of the plaintiffs to file Supplemental Bill and in support of Motion of Anders Larson, et al (No. (5) supra) to vacate or dissolve the Temporary Restraining Order; whereupon, Leonard B. Slosson, Esq., argues to the Court in behalf of his clients in opposition to the Motion of the plaintiffs to file said Supplemental Bill, and H. C. Johnston, Esq., thereafter arguing further to the Court, it is now ordered that said Supplemental Bill of Complaint, now on file, be filed by the Clerk, that the Objections of the defendants thereto be overruled. An Exception is noted.

Peirson M. Hall, Esq., now argues to the Court in support of the Motion of Harry W. Berdie for an Order vacating or dissolving the Temporary Restraining Order and in support of the Motion of Harry W. Berdie for an Order dismissing the above entitled proceedings (No. 2 supra), after which Lewis D. Collings, Esq., argues to the Court in opposition thereto; whereupon, the Court makes a statement and orders said Motions of Harry W. Berdie (No. 2 supra) be, and the same are hereby, denied. An exception is noted.

Leonard B. Slosson, Esq., now argues to the Court in support of the Motion of defendants Los Angeles Milk Industry Board, et al. (No. 3 supra), and the Motion of the defendant Milk Producers, Inc., a California corporation, (No. 4 supra) for an Order vacating or dissolving the Temporary Restraining Order and in support of the

Motion of said defendants for an Order dismissing the above entitled proceedings as to said defendants, and Lewis D. Collings, Esq., thereafter argues to the Court in opposition thereto; whereupon, the Court orders that said Motions, Nos. 1, 3, 4 and 5, stand submitted for the decision of the Court.

[Title of Court and Cause]

In Equity No. 144-C

SUPPLEMENTAL BILL OF COMPLAINT FOR INJUNCTION.

To the Honorable George Cosgrave, Judge of the above entitled Court:

The above named plaintiffs bring this their supplemental bill of complaint against the above named defendants and in so doing allege and represent to the above entitled court as follows, to-wit:

I.

That the defendant Anders Larsen, named in the original bill for injunction herein as John One, is, as plaintiffs are informed and believe and upon such information and belief allege the facts to be, the enforcement officer of the Agricultural Adjustment Administration of the United States Department of Agriculture for the Los Angeles sales area, appointed as such by the Secretary of Agriculture of the United States, and in like manner plaintiffs allege that the said Anders Larsen assumes and claims the right and power of enforcement of the provisions of the milk license attached to the original complaint herein and designated herein-

after as License No. 17 of said Agricultural Adjustment Administration, and also of the license attached hereto and marked Exhibit "C," hereinafter referred to, and also referred to as License No. 57; and in like manner assumes and claims the right and power of enforcement of the orders of the Secretary of Agriculture dated July 28, 1934, purportedly forfeiting the licenses of plaintiffs, as is more fully set forth hereinafter.

II.

That the defendant H. C. Darger, sued herein in the original complaint as John Two, as plaintiffs are informed and believe, and upon such information and belief allege, is market administrator, appointed as such by the Secretary of Agriculture of the United States under and pursuant to the terms and provisions of the purported License No. 57, attached hereto and marked Exhibit "C," which said purported license is designated "License for Milk, Los Angeles, California Sales Area," hereinafter specified and referred to; and in like manner plaintiffs allege that said H. C. Darger assumes and claims the right and power of enforcement of the provisions of said purported License No. 57.

III.

That defendant Pierson M. Hall, sued in the original bill of complaint for injunction herein as John Three, as plaintiffs are informed and believe and upon such information and belief allege, is the duly appointed, qualified and acting United States District Attorney for the Southern District of California, and is the person designated by the terms and provisions of the Agricultural Adjustment Act, more particularly Section 8 (a),

subdivision 7 thereof, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in or pursuant to said Agricultural Adjustment Act.

IV.

That the defendants Anders Larsen, sued herein as John One, H. C. Darger, sued herein as John Two, Pierson M. Hall, as United States District Attorney for the Southern District of California, sued herein as John Three, John Four, John Five, John Six, John Seven, John Eight, John Nine, John Ten, John One Company, a co-partnership, John Two Company, a co-partnership, John Three Company, a co-partnership, John One Company, a corporation, John Two Company, a corporation, and John Three Company, a corporation, were and are sued herein under fictitious names, their true names being unknown to plaintiffs at the time of the filing of the original complaint herein and at this time, except as to such fictitious defendants now named by their true names, and leave of Court will be asked to substitute their true names when and if the same are escertained; each of said defendants sued herein under fictitious names claims or claims to have some right or authority to act in the enforcement as against these plaintiffs of the provisions of said purported License No. 17 (Exhibit "A" in plaintiffs' original bill) and said purported License No. 57 hereinafter referred to and specified, and of the orders of the Secretary of Agriculture, dated July 28, 1934, purportedly forfeiting the licenses of plaintiffs, as is more fully set forth hereinafter.

V.

Plaintiffs further allege and show that the matters in controversy in this suit and the questions involved therein

are questions arising under the Constitution and the laws of the United States of America, and that the subject-matter sought to be protected by this suit, to-wit, the business of each of said plaintiffs and the right of each of said plaintiffs to continue and to carry on the conduct and operation of the same without interference on the part of the defendants, all as hereinafter set forth, is severally of a value greatly in excess of Three Thousand Dollars.

VI.

On the 25th day of August, 1933, the Secretary of Agriculture of the United States did make, prescribe and publish General Regulations, Series 3, and the same were approved by the President of the United States on the 26th day of August, 1933. Said General Regulations, Series 3, so far as pertinent, are as follows:

"ARTICLE I

"Definitions

"Section 100. As used in these regulations:

"(a) The term "act" means the Agricultural Adjustment Act, approved May 12, 1933, as amended.

"(b) The term "Secretary" means the Secretary of Agriculture of the United States.

"(c) The term "Department" means the United States Department of Agriculture.

"(d) The term "person" means an individual, corporation, partnership, unincorporated association, or any other business unit.

"(e) The term "License" means any license which has been issued by the Secretary pursuant to section 8 (3) of the Act.

"ARTICLE II

"PROVISIONS RELATING TO THE REVOCATION OR SUSPENSION OF LICENSES AND THE PROCEDURE IN CONNECTION THEREWITH.

"Section 200. Whenever the Secretary, or such officer or employee of the Department as he may designate for the purpose, has reason to believe that any licensee, or any officer, employee, or agent of any licensee, or any other person with the consent or connivance of such licensee, has violated or is violating the terms or conditions of a license, the Secretary, or such officer or employee of the Department as he may designate for the purpose, may, by notice served personally upon such licensee, or any agent of such licensee in active charge of the business licensed, or by depositing in the United States mails a notice in writing, registered and addressed to such licensee at the last known business address of such licensee, order such licensee to show cause in writing on or before a certain date to be named in said notice, why the Secretary should not revoke or suspend such license.

"Sec. 201. Said notice shall contain:

"(a) A statement of the alleged violations of the terms or conditions of the license.

"(b) A statement of the time (which shall not be less than 10 days after service or mailing of such notice, as required by sec. 200) within which the licensee must comply with said order by filing, at such place and with such person as shall be designated in the notice, a written answer in triplicate to the charges alleged in said notice.

"Sec. 202. A copy of the aforesaid notice shall be filed in the office of the chief hearing clerk in the Department of Agriculture, Washington, D. C. and shall be available for public inspection in such office.

"Sec. 203. (a) Within the time required by the notice, the licensee shall file, at such place and with such person as shall be designated in the notice, a written answer in triplicate to the charges contained in such notice.

"(b) Said answer shall be divided into paragraphs and shall contain categorical admissions or denials of the several charges and facts alleged in said notice, and all denials therein contained shall be amplified by full and frank statements of the facts concerning said alleged violations, and the matters of defense relied upon.

"(c) Said answer shall contain a statement of the correct name and address of the licensee to whom the order has been mailed or sent. If said licensee is incorporated, such fact shall be stated together with the name of the State of incorporation and the names and addresses of its officers and directors. If such licensee is a member of an unincorporated association, partnership, or other business unit licensed, said answer shall disclose the correct names and addresses of all the members constituting said business unit.

"(d) If the licensee is not a natural person, said answer shall contain the name and address of an individual, as agent of said licensee to whom notice of further proceedings may be mailed or sent and for no other purpose. Such answer shall be supported by an affidavit to the truth of the matters stated therein made by the licensee or a duly authorized agent of the licensee who has knowledge of the facts.

"Sec. 204. Upon proper cause shown, the Secretary, or such officer or employee of the Department as he may designate for the purpose, may extend the time within which such answer shall be filed, provided, application for such extension be made within the time to show cause set forth in said notice.

"Sec. 205. The parties to every such proceeding shall be the Secretary, who shall enter an appearance and be represented by counsel, and the licensee, who may appear in proper person or by counsel. Any other person desiring to intervene in such proceeding shall make an application to the Secretary to be made a party thereto, setting forth the grounds on which such person claims to be interested, and the Secretary, or such officer or employee of the Department as he may designate for the purpose, may, by order, permit the intervention of such person, in proper person or by counsel, to such extent and upon such terms as may be deemed just.

"Sec. 206. If the Secretary finds the answer of such licensee to be sufficient, such licensee shall be duly notified of the dismissal of the proceedings initiated by said notice, and an order of dismissal shall be filed in the office of the chief hearing clerk.

"Sec. 207. If the proceedings be not dismissed by the Secretary, the Secretary, or such officer or employee of the Department as he may designate for the purpose, may appoint a time (which shall not be earlier than 5 days after the date on which the answer is required to be filed) and designate a place for a hearing to be held in the State where the licensee's principal place of business is located, or in Washington, D. C., or at any other

place mutually agreeable to the Secretary and the licensee. The Secretary or such officer or employee of the Department as he may designate for the purpose shall at least 5 days prior to the hearing give or mail to the licensee, in the manner provided in section 200, or to the agent of the licensee designated in the answer of the licensee as the person to whom such notice may be mailed or sent, a written notice, which notice shall specify the time, place and purpose of said hearing.

"Sec. 208. Every such hearing shall be conducted by a presiding officer, who shall be the Secretary, or such officer or employee of the Department as the Secretary may designate for the purpose. Any such designation may be made or revoked by the Secretary at any time before or during any hearing. Such hearing shall be conducted in the manner to be determined by the presiding officer as will best conduce to the proper dispatch of business and the attainment of justice."

VII.

That said defendant, Los Angeles Milk Industry Board, and the individual defendants named herein as the members of said board, demanded of these plaintiffs and each of them that they file with the chairman of said board prior to February 5, 1934, and prior to the 5th day of each of the months of March, April, May and June, 1934, a statement as required by said purported License No. 17, as set forth in paragraphs XII and XXII of plaintiff's original bill for injunction.

VIII.

That said defendant Los Angeles Milk Industry Board, and the individual defendants named herein as members thereof, have demanded of these plaintiffs and

each of them that they and each of them deduct from the amount payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the times commencing December 1, 1933, and ending December 31, 1933, both dates inclusive, and commencing January 1, 1934, and ending January 31, 1934, both dates inclusive, and pay to said board certain sums equaling in amount one-quarter cent for each pound of butter fat contained in the milk purchased by each of said plaintiffs as a distributor, and in cases where one or more of the plaintiffs are distributors having production of their own, have demanded of said plaintiffs that they deduct a like amount for each pound of butter fat contained in milk produced and sold by them during said periods and each said period, and pay the same to the Los Angeles Milk Industry Board; said defendants have also demanded of plaintiffs, and each of them, that whether they have production of their own or not they pay, as distributors, to said Los Angeles Milk Industry Board sums equaling an additional amount of one-quarter cent for each pound of butter fat contained in the milk distributed by each of said plaintiffs during said period. Said demands were made under and by virtue of the provisions of Section III, paragraph 4 (b) of said purported license, a copy of which is annexed to the original bill of complaint and marked Exhibit "A". Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

IX.

That said defendant Los Angeles Milk Industry Board, and the individual defendants named herein as

members of said board, have demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of plaintiffs as a distributor purchased milk during the times commencing December 1, 1933, and ending December 31, 1933, both dates inclusive, and January 1, 1934, to January 31, 1934, both dates inclusive, and pay to said board an amount for each pound of butter fat contained in milk purchased from each of the producers who sell to said plaintiffs, claimed by them to be equal to the average amount which the members of the several associations or organizations of milk producers named in said purported license were then authorizing their distributors to pay over to such associations or organizations on behalf of their respective members, and that similar payments be made by plaintiffs having production of their own. That none of the producers from whom plaintiffs are so purchasing milk is, or at any of said times was, a member of any of said associations or organizations, and that none of plaintiffs is such member. The specific amount which said defendants have demanded of these plaintiffs under this head for the period above mentioned is eight-tenths of a cent for each pound of butter fat contained in the milk so purchased and/or produced in December, 1933, and .52 of a cent for each pound of butter fat contained in the milk so purchased and/or produced in January, 1934. Said demands were made under and by virtue of the provisions of Section III, paragraph 4 (c) of said purported license, a copy of which is annexed to plaintiff's original bill herein and marked Exhibit "A". Upon their information and belief plaintiffs allege that said amounts were not calculated

in accordance with the provisions of said purported license.

X.

That said defendant Los Angeles Milk Industry Board and the individual defendants named herein as the members of said board and said Milk Producers, Inc., have demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the time commencing December 1, 1933, and ending December 31, 1933, both dates inclusive, and commencing January 1, 1934, and ending January 31, 1934, both dates inclusive, and pay over to said defendants certain specific amounts of money claimed by them to have been calculated as provided in Section III, paragraphs 5 (a), (b), and (c), of said purported License No. 17, and have demanded that similar payments for the same periods be made by plaintiffs having production of their own. That for the month of December, 1933, said board has determined said amount to be 31c per pound of butter fat, being the difference between the base price of 51c per pound and the surplus price of 20c per pound of butter fat, and has fixed for said period of December, 1933, a further charge of 1c per pound of butter fat, designating the same as "deduction from adjusted basic average," and for said period of January, 1934, said board determined said amount to be 31½c per pound of butter fat, being the difference between the base price of 51c per pound and the surplus price of 19½c per pound of butter fat. Said demands were made arbitrarily and were purported to be made under and by virtue

of the sections of said purported license. Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XI.

That said defendant Los Angeles Milk Industry Board, and the individual defendants named herein as members thereof, have demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the time commencing February 1, 1934, and ending February 28, 1934, both dates inclusive, and pay to said board certain sums equaling in amount one-quarter cent for each pound of butter fat contained in the milk purchased by each of said plaintiffs as a distributor, and in cases where one or more of the plaintiffs are distributors having production of their own, have demanded of said plaintiffs that they deduct a like amount for each pound of butter fat contained in milk produced and sold by them during said period and pay the same to the Los Angeles Milk Industry Board; said defendants have also demanded of plaintiffs, and each of them, that whether they have production of their own or not they pay, as distributors, to said Los Angeles Milk Industry Board sums equaling an additional amount of one-quarter cent for each pound of butter fat contained in the milk distributed by each of said plaintiffs during said period. Said demands were made under and by virtue of the provisions of Section III, paragraph 4 (b) of said purported license, a copy of which is annexed to the original bill of plaintiff herein and marked Exhibit "A." Upon

their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XII.

That said defendant Los Angeles Milk Industry Board, and the individual defendants named herein as members of said board, have demanded of these plaintiffs, and each of them, that they and each of them deduct from the amount payable to each producer from whom each of plaintiffs as a distributor purchased milk during the time commencing February 1, 1934, and ending February 28, 1934, both dates inclusive, and pay to said board an amount for each pound of butter fat contained in milk purchased from each of the producers who sell to said plaintiffs, claimed by them to be equal to the average amount which the members of the several associations of milk producers named in said purported license were then authorizing their distributors to pay over to such associations or organizations on behalf of their respective members, and that similar payments be made by plaintiffs having production of their own. That none of the producers from whom plaintiffs are so purchasing milk, and none of plaintiffs is, or at said time was, a member of any of said organizations or associations. The specific amount which said defendants have demanded of these plaintiffs under this head for the period above mentioned is sixty-six hundreths of a cent for each pound of butter fat contained in the milk so purchased and/or produced in February, 1934. Said demands were made under and by virtue of the provisions of Section III, paragraph 4 (c) of said purported license, a copy of which is annexed to plain-

tiff's original bill herein and marked Exhibit "A." Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XIII.

That said defendant Los Angeles Milk Industry Board and the individual defendants named herein as members of said board and said Milk Producers, Inc., have demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the time commencing February 1, 1934, and ending February 28, 1934, both dates inclusive, and pay over to said defendants certain specific amounts of money claimed by them to have been calculated as provided in Section III, paragraphs 5 (a), (b), and (c), of said purported License No. 17, and have demanded that similar payments for the same period be made by plaintiffs having production of their own. That for the month of February, 1934, said board has determined said amount to be twenty-six and one-half cents per pound of butter fat, being the difference between the base price of fifty-one cents per pound and the surplus price of twenty-four and one-half cents per pound of butter fat. Said demands were made arbitrarily and purported to be made under and by virtue of said sections of said purported license. Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XIV.

That said defendant Los Angeles Milk Industry Board, and the individual defendants named herein as members thereof, have demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the time commencing March 1, 1934, and ending March 31, 1934, both dates inclusive, and pay to said board certain sums equaling in amount one-quarter cent for each pound of butter fat contained in the milk purchased by each of said plaintiffs as a distributor, and in cases where one or more of the plaintiffs are distributors having production of their own have demanded of said plaintiffs that they deduct a like amount for each pound of butter fat contained in milk produced and sold by them during said period and pay the same to the Los Angeles Milk Industry Board; said defendants have also demanded of plaintiffs, and each of them, that whether they have production of their own or not they pay, as distributors, to said Los Angeles Milk Industry Board sums equaling an additional amount of one-quarter cent for each pound of butter fat contained in the milk distributed by each of said plaintiffs during said period. Said demands were made under and by virtue of the provisions of Section III, paragraph 4 (b) of said purported license, a copy of which is annexed to plaintiffs' original bill herein and marked Exhibit "A." Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XV.

That said defendant Los Angeles Milk Industry Board, and the individual defendants named herein as members of said board, have demanded of these plaintiffs and each of them that they and each of them, deduct from the amount payable to each producer from whom each of the plaintiffs as a distributor purchased milk during the time commencing March 1, 1934, and ending March 31, 1934, both dates inclusive, and pay to said board an amount for each pound of butter fat contained in milk purchased from each of the producers who sell to said plaintiffs which they claim to be equal to the average amount which the members of the several associations or organizations of milk producers named in said purported license were then authorizing their distributors to pay over to such associations or organizations on behalf of their respective members, and that similar payments be made by plaintiffs having production of their own. That none of the producers from whom plaintiffs are so purchasing milk and none of plaintiffs is, or at said time was, a member of any of said associations or organizations. The specific amount which said defendants have demanded of these plaintiffs under this head for the period above mentioned is six-tenths of a cent for each pound of butter fat contained in the milk so purchased and/or produced in March, 1934. Said demands were made under and by virtue of the provisions of Section III, paragraph 4 (c) of said purported license, a copy of which is annexed to plaintiffs' original bill herein and marked Exhibit "A." Upon their information and belief plaintiffs allege that said amounts were not cal-

culated in accordance with the provisions of said purported license.

XVI.

That said defendant Los Angeles Milk Industry Board and the individual defendants named herein as the members of said Board, and said Milk Producers, Inc., have demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the time commencing March 1, 1934, and ending March 31, 1934, both dates inclusive, and pay over to said defendants certain specific amounts of money claimed by them to have been calculated as provided in Section III, paragraphs 5 (a), (b) and (c) of said purported License No. 17, and have demanded that similar payments for the same period be made by plaintiffs having production of their own. That for the month of March, 1934, said board has determined said amount to be twenty-seven cents per pound of butter fat, being the difference between the base price of fifty-one cents per pound and the surplus price of twenty-four cents per pound of butter fat. Said demands were made arbitrarily and purported to be made under and by virtue of the sections of said purported license. Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XVII.

That said defendant Los Angeles Milk Industry Board, and the individual defendants named herein as members thereof, have demanded of these plaintiffs and each of them that they and each of them deduct from the amount

payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the time commencing April 1, 1934, and ending April 30, 1934, both dates inclusive, and pay to said board certain sums equaling in amount one-quarter of a cent for each pound of butter fat contained in the milk purchased by each of said plaintiffs as a distributor, and in cases where one or more of the plaintiffs are distributors having production of their own have demanded of said plaintiffs that they deduct a like amount for each pound of butter fat contained in milk produced and sold by them during said period and pay the same to the Los Angeles Milk Industry Board; said defendants have also demanded of plaintiffs, and each of them, that, whether they have production of their own or not, they pay as distributors to said Los Angeles Milk Industry Board sums equaling an additional amount of one-quarter of a cent for each pound of butter fat contained in the milk distributed by each of said plaintiffs during said period. Said demands were made under and by virtue of the provisions of Section III, paragraph 4 (b) of said purported license, a copy of which is anexed to plaintiffs' original bill herein and marked Exhibit "A." Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XVIII.

That said defendant Los Angeles Milk Industry Board, and the individual defendants named herein as members of said board, have demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of

the plaintiffs as a distributor purchased milk during the time commencing April 1, 1934, and ending April 30, 1934, both dates inclusive, and pay to said board an amount for each pound of butter fat contained in milk purchased from each of the producers who sell to said plaintiffs which they claim to be equal to the average amount which the members of the several associations or organizations of milk producers named in said purported license were then authorizing their distributors to pay over to such associations or organizations on behalf of their respective members, and that similar payments be made by plaintiffs having production of their own. That none of the producers from whom plaintiffs are so purchasing milk and none of plaintiffs is, or at said times was, a member of any of said associations or organizations. The specific amount which said defendants have demanded of these plaintiffs under this head for the period above mentioned is six-tenths of a cent for each pound of butter fat contained in the milk so purchased and/or produced in April, 1934. Said demands were made under and by virtue of the provisions of Section III, paragraph 4 (c) of said purported license, a copy of which is annexed to plaintiffs' original bill and marked Exhibit "A." Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XIX.

That said defendant Los Angeles Milk Industry Board and the individual defendants named herein as the members of said board, and said Milk Producers, Inc., have demanded of these plaintiffs and each of them that they

and each of them deduct from the amount payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the time commencing April 1, 1934, and ending April 30, 1934, both dates inclusive, and pay over to said defendants certain specific amounts of money claimed by them to have been calculated as provided in Section III, paragraphs 5 (a), (b) and (c) of said purported License No. 17, and have demanded that similar payments for the same period be made by plaintiffs having production of their own. That for the month of April, 1934, said board has determined said amount to be twenty-nine and one-half cents per pound of butter fat, being the difference between the base price of fifty-one cents per pound and the surplus price of twenty-one and one-half per pound of butter fat, and has fixed for said period of April, 1934, a further charge of three cents per pound of butter fat, designating the same as "deduction from adjusted basic average." Said demands were made arbitrarily and purported to be made under and by virtue of the sections of said purported license. Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XX.

That said defendant Los Angeles Milk Industry Board, and the individual defendants named herein as members thereof, have demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the time commencing May 1, 1934, and ending May 31, 1934, both

dates inclusive, and pay to said board certain sums equaling in amount one-quarter of a cent, for each pound of butter fat contained in the milk purchased by each of said plaintiffs as a distributor, and in cases where one or more of the plaintiffs are distributors having production of their own have demanded of said plaintiffs that they deduct a like amount for each pound of butter fat contained in the milk produced and sold by them during said period and pay the same to the Los Angeles Milk Industry Board; said defendants have also demanded of plaintiffs and each of them that whether they have production of their own or not, they pay as distributors to said Los Angeles Milk Industry Board sums equaling an additional amount of one-quarter of a cent for each pound of butter fat contained in the milk distributed by each of said plaintiffs during said period. Said demands were made under and by virtue of the provisions of Section III, paragraph 4 (b) of said purported license, a copy of which is annexed to plaintiffs' original bill and marked Exhibit "A." Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XXI.

That said defendant Los Angeles Milk Industry Board, and the individual defendants named herein as members of said board, have demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of the plaintiffs as a distributor purchased milk during the time commencing May 1, 1934, and ending May 31, 1934, both dates inclusive, and pay to said board an

amount for each pound of butter fat contained in milk purchased from each of the producers who sell to said plaintiffs claimed by them to be equal to the average amount which the members of the several associations or organizations of milk producers named in said purported license were then authorizing their distributors to pay over to such associations or organizations on behalf of their respective members, and that similar payments be made by plaintiffs having production of their own. That none of the producers from whom plaintiffs are so purchasing milk, and none of plaintiffs is, or at said time was, a member of any of said associations or organizations. The specific amount which said defendants have demanded of these plaintiffs under this head for the period above mentioned is six-tenths of a cent for each pound of butter fat contained in the milk so purchased and/or produced in May, 1934. Said demands were made under and by virtue of the provisions of Section III, paragraph 4 (c) of said purported license, a copy of which is annexed to plaintiffs' original bill and marked Exhibit "A." Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XXII.

That said defendant Los Angeles Milk Industry Board and the individual defendants named herein as the members of said board, and said Milk Producers, Inc., have demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the time commencing

May 1, 1934, and ending May 31, 1934, both dates inclusive, and pay over to said defendants certain specific amounts of money claimed by them to have been calculated as provided in Section III, paragraphs 5 (a), (b) and (c) of said purported License No. 17, and have demanded that similar payments for the same period may be made by plaintiffs having production of their own. That for the month of May, 1934, said board has determined said amount to be twenty-nine and one-half cents per pound of butter fat, being the difference between the base price of fifty-one cents per pound and the surplus price of twenty-one and one-half cents per pound of butter fat. Said demands were made arbitrarily and purported to be made under and by virtue of the sections of said purported license. Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XXIII.

That said defendants Milk Producers, Inc., and Los Angeles Milk Industry Board, and the individual defendants named as members thereof, at the end of each period as aforesaid from November 20, 1933, to May 31, 1934, inclusive, rendered to plaintiffs and each of them a statement making the various demands as hereinbefore set forth, and thereafter and at divers times during said periods have rendered to said plaintiffs and each of them what purported to be various corrected and amended statements, all in different amounts and making different demands for like periods of time, so that plaintiffs and each of them are uncertain as to the exact amounts so claimed to be due to such defendants

Milk Producers, Inc., and Los Angeles Milk Industry Board from plaintiffs herein. Upon their information and belief plaintiffs allege that said amounts were not calculated in accordance with the provisions of said purported license.

XXIV.

That on the 21st day of February, 1934, H. A. Wallace, Secretary of Agriculture of the United States, issued and caused to be served by registered mail upon the plaintiff Charles J. Kurtz, doing business as Golden West Creamery Company, an order to show cause in Case No. 17-1-4 why the said license of the said Charles J. Kurtz should not be suspended or revoked. That said order to show cause contained statements of alleged violations of the terms and conditions of License No. 17 charged against the said Charles J. Kurtz, a copy of which statements is set forth in the findings of fact and order of the Secretary attached hereto, marked Exhibit "D" and hereinafter referred to.

That thereafter and on or about the 9th day of March, 1934, the said plaintiff, Charles J. Kurtz, doing business as Golden West Creamery Company, made and filed an answer to said order to show cause and the charges contained therein and filed the same with the said Secretary of Agriculture.

That on or about the 6th day of March, 1934, said Secretary of Agriculture set the said matter for hearing in Los Angeles, California, on the 16th day of March, 1934.

XXV.

That on the 21st day of February, 1934, H. A. Wallace, Secretary of Agriculture of the United States,

issued and caused to be served by registered mail upon the plaintiff Western Holstein Farms, Inc., a corporation, an order to show cause in case No. 17-1-5 why the said license of the said Western Holstein Farms, Inc., should not be suspended or revoked. That said order to show cause contained statements of alleged violations of the terms and conditions of License No. 17 charged against the said Western Holstein Farms, Inc., a copy of which statements is set forth in the findings of fact and order of the Secretary attached hereto, marked Exhibit "E" and hereinafter referred to.

That thereafter and on or about the 9th day of March, 1934, the said plaintiff, Western Holstein Farms, Inc., made and filed an answer to said order to show cause and the charges contained therein, and filed the same with the said Secretaryof Agriculture.

That on or about the 6th day of March, 1934, said Secretary of Agriculture set the said matter for hearing in Los Angeles, California, on the 16th day of March, 1934.

XXVI.

That on the 21st day of February, 1934, H. A. Wallace, Secretary of Agriculture of the United States, issued and caused to be served by registered mail upon the plaintiff Valley Dairy Co., Inc., a corporation, an order to show cause in case No. 17-1-7 why the license of the said Valley Dairy Co., Inc., should not be suspended or revoked. That said order to show cause contained statements of alleged violations of the terms and conditions of License No. 17 charged against the said Valley Dairy Co., Inc., a copy of which statements is set forth in the findings of fact and order of the Secre-

tary attached hereto, marked Exhibit "F" and hereinafter referred to.

That thereafter and on or about the 9th day of March, 1934, the said plaintiff, Valley Dairy Co., Inc., made and filed an answer to said order to show cause and the charges contained therein, and filed the same with the said Secretary of Agriculture.

That on or about the 6th day of March, 1934, said Secretary of Agriculture set the said matter for hearing in Los Angeles, California, on the 16th day of March, 1934.

XXVII.

That on the 21st day of February, 1934, H. A. Wallace, Secretary of Agriculture of the United States, issued and caused to be served by registered mail upon the plaintiff, The Lucerne Cream and Butter Company, a corporation, an order to show cause in case No. 17-1-6, why the license of the said The Lucerne Cream and Butter Company should not be suspended or revoked. That said order to show cause contained statements of alleged violations of the terms and conditions of License No. 17 charged against the said The Lucerne Cream and Butter Company, a copy of which statements is set forth in the findings of fact and order of the Secretary attached hereto, marked Exhibit "G" and hereinafter referred to.

That thereafter and on or about the 9th day of March, 1934, the said plaintiff, The Lucerne Cream and Butter Company, made and filed an answer to said order to show cause and the charges contained therein, and filed the same with the said Secretary of Agriculture.

That on or about the 6th day of March, 1934, said Secretary of Agriculture set the said matter for hearing in Los Angeles, California, on the 16th day of March, 1934.

XXVIII.

That thereafter said Secretary of Agriculture appointed one Arthur P. Curran, an officer and employee of the United States Department of Agriculture, as hearing and presiding officer of such citations and orders to show cause, and appointed C. P. Dorr and A. P. Hadley, officers and employees of the said United States Department of Agriculture, to represent the said Secretary of Agriculture at said hearings.

XXIX.

That all of the four aforementioned hearings were consolidated. That plaintiffs specially and specifically objected to the jurisdiction of the presiding officer, said Arthur P. Curran, and of the Secretary of Agriculture, of and over the subject-matter of the charges and of and/or over the persons and businesses of said plaintiffs and each of them, and objected to the holding of said hearing or trial, and moved that said proceedings and said orders to show cause be dismissed upon the ground and for the reason that said presiding officer was not sitting as a court with jurisdiction to try the issues raised by said orders to show cause and the answers thereto, and particularly that all of the judicial power of the United States Government is vested in the Supreme Court of the United States and in such inferior courts as the Congress may from time to time ordain and establish, and that said hearing was a proceeding to

try plaintiffs herein before a tribunal established by the Secretary of Agriculture, and said tribunal had no jurisdiction to hear or try or determine the same.

Said plaintiffs and each of them further objected to said proceedings and moved to dismiss the same, and said orders to show cause, because said A. P. Curran was not a judge of an inferior court, ordained and established by Congress and holding office during good behavior, but was an appointee and representative of the Secretary of Agriculture only and was entirely without jurisdiction to hear or try or determine any issue presented by said orders to show cause or the answers thereto.

Said plaintiffs and each of them further objected to said proceeding and moved to dismiss the same and said orders to show cause upon the ground that neither the Constitution nor the National Agricultural Adjustment Act gives to the Secretary of Agriculture the power to delegate any authority vested in him to said A. P. Curran or to confer upon him any judicial power.

Said plaintiffs and each of them further objected to said proceedings and moved to dismiss the same and said orders to show cause because said proceedings was criminal in its nature and said plaintiffs and each of them were placed on trial without a presentment or indictment by a grand jury, contrary to the provision of Article V of the Amendments to the Constitution of the United States.

Said plaintiffs and each of them objected to said proceeding and moved to dismiss the same and said orders to show cause upon the ground that the terms and con-

ditions of said purported License No. 17 were fixed and provided by the Secretary of Agriculture; that the charges of violation thereof, as contained in said orders to show cause, were made by said Secretary of Agriculture and that said Secretary of Agriculture appeared in said proceeding as the prosecutor thereof; that therefore said Secretary of Agriculture, or any representative appointed by said Secretary of Agriculture, or any tribunal created by him, was without jurisdiction to hear or try or determine any of the issues presented by said orders to show cause and the answers thereto.

That said plaintiffs and each of them further objected to the jurisdiction of said tribunal and of said A. P. Curran to hear or try or determine any of the matters set forth in the orders to show cause, and severally moved that said proceeding and said orders to show cause be dismissed upon each of the grounds and for each of the reasons hereinafter stated in paragraph XLIX of this supplemental bill of complaint.

Said A. P. Curran overruled each and all of said objections and denied each and all of said motions, and held and ruled that all of the provisions of said National Agricultural Adjustment Act herein referred to were valid and constitutional, and that all of the provisions of said purported License No. 17 were valid, lawful and constitutional and within the authority of the Secretary of Agriculture to enact and impose, and that he as presiding officer had full power, authority and jurisdiction to preside at said hearing.

Said plaintiffs and each of them then objected to said proceeding and moved to dismiss the same and said

orders to show cause, because each of said plaintiffs had been denied the right to a trial by jury, granted by the provisions of Article VI and Article VII of the Amendments to the Constitution of the United States. Said A. P. Curran overruled said objections and denied said motions.

XXX.

That after the commencement of said hearing and prior to the introduction of any testimony thereat, the said plaintiffs, and each of them, through their respective counsel, raised certain objections to the jurisdiction of the Secretary of Agriculture to try the issues raised by said orders to show cause and the answers thereto, which objections to said jurisdiction were raised in said answers, and said objections were overruled by said presiding officer and motions to dismiss said proceedings, based on said lack of jurisdiction, were denied. Thereafter, and over the objections of the respondents, the plaintiffs herein, and their counsel, testimony was introduced by counsel for the said Secretary of Agriculture and the matter continued from time to time to and including the 18th day of June, 1934.

XXXI.

On the 31st day of May, 1934, the Secretary of Agriculture of the United States issued a document entitled "Termination of License for Milk—Los Angeles Milk Shed," wherein and whereby he did terminate, effective on and after 12:01 A. M. Eastern Standard Time, June 1, 1934, said License No. 17, dated November 16, 1933; that said Order of Termination of said License is in the words and figures following, to-wit:

"TERMINATION OF LICENSE FOR MILK— LOS ANGELES MILK SHED

"WHEREAS, the secretary acting under the provisions of the Agricultural Adjustment Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, did, on the 16th day of November, 1933, execute under his hand and the official seal of the Department of Agriculture, a certain License entitled "License for Milk—Los Angeles Milk Shed," (hereinafter referred to as the "License"), and

"WHEREAS, the Secretary has determined to terminate the aforesaid License,

"NOW, THEREFORE, the Secretary of Agriculture, acting under the authority vested in him as aforesaid:

"Hereby terminates the aforesaid License, but any and all obligations which have arisen, or which may hereafter arise in connection therewith, by virtue of or pursuant to such License, shall be deemed not to be affected, waived, or terminated hereby.

"IN WITNESS WHEREOF, R. G. TUGWELL, Acting Secretary of Agriculture of the United States, does hereby execute in duplicate and issue this order terminating the License for Milk—Los Angeles Milk Shed, in the City of Washington, District of Columbia, on this 31st day of May, 1934, to be effective on and after 12:01 A. M., Eastern Standard Time, June 1, 1934."

"/S/ R. G. TUGWELL
"Acting Secretary"

XXXII.

Thereafter, and on said 31st day of May, 1934, the Secretary of Agriculture of the United States executed

and issued a document entitled "License No. 57, License for Milk, Los Angeles, California Sales Area" and purported to make the same affective on and after 12:01 A. M., Eastern Standard Time, June 1, 1934, and purported to take such action under and by virtue of the provisions of said National Agricultural Adjustment Act. A true copy of said document is hereto attached, marked "Exhibit C, and is hereby made a part hereof as fully as if set forth herein verbatim.

XXXIII.

All of the provisions and regulations of said purported License No. 57, dated May 31, 1934, purport to be applicable according to its terms only within the Los Angeles Sales Area as therein defined and only to distributors engaged in the business of distributing, marketing or handling milk or cream as a distributor in said Los Angeles Sales Area, and for ultimate consumption in said Los Angeles Sales Area, and does not apply to or in any manner regulate the business of distributing, marketing or handling milk or cream when the same enters into interstate or foreign commerce.

XXXIV.

Each of said plaintiffs herein was on the 31st day of May, 1934, and at all times thereafter, to and including July 28, 1934, engaged in the business of producing and/or distributing fluid milk within the said Los Angeles Sales Area, and the above provisions of said purported license apply, according to their terms, to each of the plaintiffs in the conduct of their said business.

XXXV.

Each of the plaintiffs herein at all times on and prior to July 28, 1934, purchased and/or produced all of the

milk used by it in the conduct of its business entirely and exclusively within the State of California, and also sold and distributed milk produced and/or purchased by it entirely within said State, and none of said milk was moved or shipped outside the State of California. None of the milk produced and/or purchased and/or sold and/or distributed by any one of the four plaintiffs herein was at any time or ever entered into the current of inter-state and/or foreign commerce, but at all times was and remained entirely within the current of purely intra-state commerce.

XXXVI.

(a) That as a part of the preamble of said purported License No. 57 (Exhibit "C"), the Secretary of Agriculture recites as follows:

"Whereas, the Secretary finds that the marketing of milk for distribution in the Los Angeles Sales Area and the distribution thereof are entirely in the current of interstate commerce because the said marketing and distribution are partly interstate and partly intra-state commerce and so inextricably intermingled that said interstate commerce portion cannot be effectivey regulated or licensed without licensing that portion which is intra-state commerce."

(b) Said purported License No. 57, then provides, as follows:

"Now, Therefore, the Secretary of Agriculture, acting under the authority vested in him as aforesaid:

"Hereby licenses each and every distributor to engage in the business of distributing, marketing or handling

milk or cream as a distributor in the Los Angeles Sales Area, subject to the following terms and conditions."

(c) Said purported License No. 57, defines "Los Angeles Sales Area," as follows:

"Los Angeles Sales Area" means the territory within the corporate limits of the cities and towns of Los Angeles, Long Beach, Pasadena, South Pasadena, Glendale, Santa Ana, Fullerton, Anaheim, San Pedro, Santa Monica, San Bernardino, Riverside, Redlands, Pomona, Huntington Beach, Huntington Park, Whittier, Beverly Hills, Inglewood, Barstow; and the territory within the boundaries of Los Angeles County (including Santa Catalina Island), that part of San Bernardino County lying south of 35 degrees north latitude and west of 116 degrees west longitude, that part of Riverside County lying west of 116 degrees west longitude, and Orange County, all within the State of California."

(d) Said purported License No. 57, provides, in paragraph 1, Section II, thereof, as follows:

"The schedule governing the prices at which, and the terms and conditions under which, distributors shall purchase and/or accept delivery of milk from producers, shall be that set forth in exhibit A. Any contract or agreement entered into between any distributor and producer, prior to the effective date of this License, covering the purchase and/or delivery of milk, shall be deemed to be superseded by the terms and provisions of this License in so far as such contract or agreement is inconsistent with any provision hereof."

(e) Said purported License No. 57, provides in Paragraph 2, of Section II, thereof, as follows:

"Except as provided in exhibit A, no distributor shall purchase milk from producers except (a) those producers having bases, which are to be reported as provided in exhibit B, which is attached hereto and made a part hereof, and (b) new producers pursuant to the provisions of Exhibit A.

The schedule governing the minimum prices at which, and the terms and conditions under which, milk and cream shall be sold and/or delivered by distributors shall be that set forth in exhibit C, which is attached hereto and made a part hereof. Any contract or agreement entered into between any distributor and any person, prior to the effective date of this license, covering the sale and/or delivery of milk and/or cream, shall be deemed to be superseded by the terms and provisions of this License in so far as such contract or agreement is inconsistent with any provision hereof."

(f) Said purported License No. 57, provides in Paragraph 3, of Section II, thereof, "that no distributor shall purchase milk from any producer unless such producer authorizes such distributor with respect to payment for milk purchased from such producer, to comply with the provisions of exhibit A, attached to said purported License and set forth herein as a part of "Exhibit C."

(g) Said purported License No. 57, provides, in Paragraph 7, of Section II, thereof, as follows:

"Each distributor who is obligated to report pursuant to paragraph 4 of Section A, of exhibit A shall within thirty days after the effective date of the License, furnish to the Market Administrator a bond with good and

sufficient surety thereon, satisfactory to the Market Administrator (in an amount not in excess of the purchase value of the milk purchased by such distributor during any two successive delivery periods as designated by the Market Administrator) for the purpose of securing the fulfillment of such distributor's obligations as provided in exhibit A. Any distributor who commences to do business after the effective date of this License shall, as a condition precedent to engaging in such business, furnish to the Market Administrator a bond in conformity with the foregoing provision.

"The Market Administrator may, (2) if satisfied from the investigation of the financial conditions of a distributor that such distributor is solvent and/or possessed of sufficient assets to fulfill his said obligations, or (b), if, pursuant to a State statute, a distributor has furnished a bond with good and sufficient surety thereon in conformity with the foregoing provision, waive the requirements of the bond as to such distributor. Such distributor may, upon a change in such circumstances, be required by the Market Administrator to comply with the foregoing requirement.

"Each distributor who is unable to meet the requirements of the foregoing provisions, shall make periodic deposits, with the Market Administrator at such times, in such amounts, and in such manner as the Market Administrator may determine to be necessary in order to secure the fulfillment of such distributor's obligations as provided in exhibit A.

"Each and every distributor shall fulfill any and all of his obligations which shall have arisen or which may

hereafter arise in connection with, by virtue of, or pursuant to, the license for milk in the Los Angeles Sales Area issued by the Secretary on November 16, 1933."

XXXVII

That each of the plaintiffs was on and prior to July 28, 1934, engaged in the business of distributing, marketing and handling milk and cream as a distributor in the Los Angeles Sales Area; that some of the plaintiffs produced within the territory of the State of California, defined by said purported license as "Los Angeles Sales Area," a portion of the milk and cream distributed, marketed and handled by such plaintiff, and secured all other portions of the milk and cream which were distributed, marketed or handled by such plaintiffs from farmers whose farms are located wholly within the State of California and in the territory therein included within said Los Angeles Sales area; that no part of the milk or cream distributed, marketed or handled by any of the plaintiffs herein was sold or disposed of to persons residing outside the State of California, or to any person engaged in interstate commerce, so that such products were transported or disposed of outside the State of California; that as plaintiffs are informed and believe, and therefore allege the facts to be, no part of the milk or cream which is, or at any of the times mentioned in said purported licenses has been, distributed, marketed or handled in said Los Angeles Sales Area, is produced outside the State of California, but all thereof is, and at all said times has been, produced within the territory defined in said purported licenses as "Los Angeles Sales Area," and/or within the territory in the State of Cali-

fornia adjacent or in close proximity to said Los Angeles Sales Area, and that all of the milk and cream which is produced within the Los Angeles Sales Area is sold and disposed of within said territory defined by said license as "Los Angeles Sales Area," with the exception that at irregular times and intervals some distributors in said territory other than these plaintiffs sell and ship outside of the State of California small quantities of milk and cream after the same has been purchased within said territory and processed and prepared for shipment therein, and that the amount of milk and cream produced within said territory in the state of California which is thus transported outside the State of California is less than one-tenth of one per centum of the milk and cream produced therein and that the same is entirely separate and distinct from and in no way intermingled with the milk and cream distributed within said Los Angeles Sales Area and is not subject to the terms and conditions provided in said purported License No. 57.

XXXVIII.

That defendant H. C. Darger demanded of these plaintiffs and each of them that they file with him as Market Administrator, under said purported License No. 57, prior to June 5, 1934, and July 5, 1934, a statement as required by said purported License No. 57 and set forth in Exhibit "C" attached hereto and more particularly paragraph 4 of Exhibit "A" of said purported License No. 57 herein referred to.

XXXIX.

That said defendant H. C. Darger has demanded of these plaintiffs and each of them that they and each of

them deduct from the amount payable to each producer from whom each of these plaintiffs as a distributor purchased milk during the period commencing June 1, 1934, and ending June 30, 1934, both dates inclusive, and pay to said H. C. Darger as Market Administrator under said purported License No. 57 one-half cent per pound of butter fat contained in the milk purchased by each of said plaintiffs as a distributor, and in cases where one or more of the plaintiffs are distributors havng production of their own, has demanded of said plaintiffs that they deduct a like amount per pound of butter fat contained in milk produced and sold, used or distributed by them during said period, and pay the same to said H. C. Darger as such Market Administrator. Said demands were purported to be made under and by virtue of the provisions of said purported License No. 57 hereinbefore referred to.

XL.

Said defendant, H. C. Darger, has demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the period commencing June 1, 1934, and ending June 30, 1934, both dates inclusive, the amount of one cent per pound of butter fat contained in milk purchased from each of the producers who sold to said plaintiffs and who are not members of any association. Said demand was purported to be made under and by virtue of the terms and provisions of said purported License No. 57.

XLI.

That said defendant H. C. Darger as such Market Administrator has demanded of these plaintiffs and each of them that they and each of them deduct from the amount payable to each producer from whom each of said plaintiffs as a distributor purchased milk during the period commencing June 1, 1934, and ending June 30, 1934, both dates inclusive, and from the proceeds of the sale of milk produced by such plaintiffs having production of their own during such period, certain specific sums of money to the adjustment account of said H. C. Darger as Market Administrator, purported to be arrived at by said H. C. Darger as such Market Administrator under the terms and provisions of said purported License No. 57, and more particularly Exhibit "A" attached to said purported license, which said amounts were calculated by said H. C. Darger as such Market Administrator, the mode of such calculation or the correctness of said amounts being unknown to these plaintiffs, except that the said H. C. Darger notified each of these plaintiffs that the amount to be paid by them to producers of Class One milk, as defined in said purported License No. 57, should be forty-nine cents per pound of butter fat, instead of fifty-five cents per pound of butter fat as mentioned therein, and that the price to be paid to such producers for Class Two milk, as defined in said purported License No. 57, should be forty-four and 14/100 cents per pound of butter fat, and that the price to be paid to producers for Class Three milk, as defined in said purported License No. 57, should be thirty-eight and 14/100 cents per pound of butter fat, and the price to be paid to producers for Class Four milk,

as defined in said purported License No. 57, should be twenty-six and 46/100 cents per pound of butter fat.

XLII.

That said defendant H. C. Darger as such Market Administrator will make similar demands on these plaintiffs each month hereafter for similar deductions from producers and for similar payments to him as such Market Administrator, and will do so under and by color of said purported License No. 57.

XLIII.

That said defendant H. C. Darger as such Market Administrator, and purporting to act under said purported License No. 57 hereinbefore referred to, has demanded from said plaintiffs and each of them that they and each of them furnish to him a bond or satisfactory financial statement, pursuant to the terms of Section VII of said purported License No. 57, and in addition thereto containing a statement under oath that the party making such statement has in all respects complied with and performed all obligations arising from the purported License No. 17.

XLIV.

That said License No. 57 and the demands made and to be made thereunder upon each of the plaintiffs by the defendants, and the threatened enforcement of said demands and of said purported License No. 57 by the defendants, as hereinbefore and hereinafter more particularly set out, have a common and similar effect upon each of these plaintiffs and their several businesses.

XLV.

That on the 18th day of June, 1934, in the continuation of said hearings, last referred to in paragraph

XXXI herein, counsel for the said Secretary of Agriculture offered in evidence the order of the Secretary terminating License No. 17 hereinbefore referred to, which was received by said presiding officer, and thereafter said counsel for said Secretary of Agriculture offered in evidence a certified copy of the new License No. 57, hereinbefore referred to as Exhibit "C" of this supplemental bill for injunction, which was received in evidence over the objection of counsel for the respondents therein, the plaintiffs herein, and after said order admitting such License No. 57 into evidence in such hearings, the said counsel for the said Secretary of Agriculture moved to amend the order to show cause theretofore issued against each of the plaintiffs herein on the 21st day of January, 1934, as hereinbefore set forth, which said amendments charged, or attempted to charge, each of the plaintiffs herein with the violation of said License No. 57, and to cite and order each of the plaintiffs herein to show cause why its said license under said License No. 57 should not be suspended or revoked, by reason of each of said respondents' failure to comply with the provisions of said License No. 57 relating to their compliance of the provisions of said License No. 17. That plaintiffs herein and respondents therein, through their counsel, each severally objected to such amendment upon the grounds that the same was not an amendment, but was the issuance of a new citation and did not comply with the rules promulgated by the said Secretary of Agriculture relating to the revocation or suspension of licenses, which said rules are set forth herein in paragraph VI of this supplemental complaint. That despite said objection the said presiding officer permitted the filing of said citations or amend-

ments to the orders to show cause as hereinbefore set forth and thereupon plaintiffs herein, not being personally present or receiving service of such citation or amendments to such orders to show cause, were not, therefore, represented in person or by counsel authorized to represent them on such citations or orders to show cause; and that plaintiffs herein have not at any time received or been served, pursuant to said regulations set forth in paragraph VI of this supplemental complaint, with copies of such citations or amended orders to show cause under said License No. 57, as to why their licenses under the purported License No. 57 should be revoked or suspended.

XLVI.

That on or about the 28th day of July, 1934, as plaintiffs are informed and believe and upon such information and belief allege, the said H. A. Wallace, as such Secretary of Agriculture, made and filed in the office of the chief hearing clerk of the United States Department of Agricultural Adjustment Administration his findings of fact and order in each of said hearings, a copy of each of which, certified to by Joseph G. Walsh, deputy hearing clerk of said United States Department of Agriculture, is hereto attached, marked Exhibits "D," "E," "F" and "G" respectively and made a part hereof as though the same were fully set forth herein, and to said exhibits and each of which reference is hereby made.

That by the terms of said purported orders of H. A. Wallace, Secretary of Agriculture, herein last referred to, the licenses of each of the plaintiffs herein under said License No. 57 and the right of each of the plaintiffs herein to engage in the business of distributing fluid

milk within the said Los Angeles sales area is and was thereby attempted to be revoked, effective on and after 6 P. M. Pacific Standard Time, on the 28th day of July, 1934.

XLVII.

That each of said plaintiffs herein has for many years last past conducted, and was on the said 28th day of July, 1934, conducting and carrying on and engaging in the business of producing and/or distributing milk and cream within that part of the State of California designated in said purported License No. 57 (Exhibit "C" herein) as "Los Angeles Sales Area," and each maintained a plant containing machinery and other apparatus to handle and process milk and cream in accordance with sanitary requirements as prescribed by the laws of the State of California and by ordinances of the several cities within which said plants are located.

That each of said plaintiffs in each of said businesses as aforesaid has created good will of inestimable value; that the customers of each of said plaintiffs all reside in the State of California and none of said plaintiffs does any business with persons residing or doing business in places outside of the State of California.

That the persons from whom said plaintiffs purchased milk and cream, and the persons to whom said plaintiffs sold milk and cream, are satisfied with and desire to continue such business; that each of the plaintiffs desires to continue to engage in the business of distributing milk and cream in said Los Angeles Sales Area, but if the order of the said H. A. Wallace, Secretary of Agriculture, dated July 28, revoking the license and right of plaintiffs, and each of them, to conduct their several

businesses is enforced, said plaintiffs will thereby lose the good will and going value of their several businesses.

That under the provisions of said National Agricultural Adjustment Act the doing of business without a license, where a license is required, is punishable by a penalty of not exceeding one thousand dollars per day; that said penalty is so unusual, oppressive and unreasonable that said plaintiffs are thereby precluded from the privilege of asserting their rights independently and challenging in court by defensive tactics the validity of said purported Licenses Nos. 17 and 57 and the provisions of said National Agricultural Adjustment Act, pursuant to which said licenses purport to have been issued, without incurring the risk of being visited with such oppressive and unreasonable penalties that plaintiffs have no speedy and/or adequate remedy at law and the injury to plaintiffs' right will be irreparable unless this court shall exercise its equitable jurisdiction to issue an injunction. Moreover, interference by said defendants with plaintiffs' businesses, unless restrained by order of this Court, will be continuous to the great and irreparable injury of plaintiffs and each of them. Said penalties imposed by said Act, which are contended and believed by plaintiffs to be not legal, are so excessive as to intimidate plaintiffs by the risk of having to pay the amounts thereof, and since the ordinary method of testing the validity of said Act and the purported Licenses Nos. 17 and 57 purportedly issued thereunder would subject the plaintiffs to the risk of said enormous penalties, if in error, and that consequently said purported licenses and Act deprive plaintiffs of their property without due process of law, contrary to the Fifth Amendment to the

Constitution of the United States, and plaintiffs are without remedy except in this court of equity.

XLVIII.

That said defendant Milk Producers Inc., did, on or about the 17th day of July, 1934, commence an action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled "Milk Producers, Inc., plaintiff, vs. Lucerne Cream and Butter Company, et al., defendants," being No. 376176 in the files and records of said court, to collect and recover judgment for the amounts claimed to be due said Milk Producers, Inc., by said Lucerne Cream and Butter Company under the terms and provisions of said purported License No. 17, as arbitrarily and illegally fixed by the defendant Los Angeles Milk Industry Board as surplus deductions to be made by said Lucerne Cream and Butter Company from its producers for the periods from November 20, 1933, to May 31, 1934, both dates inclusive, as more particularly hereinbefore set forth in paragraphs X, XIII, XVI, XIX and XXII of this supplemental bill for injunction, and in the amounts as purportedly last fixed by the said Los Angeles Milk Industry Board as aforesaid, and threatens to and will institute similar actions against each of the other plaintiffs herein to collect like amounts as set forth in said paragraphs X, XIII, XVI, XIX and XXII aforesaid, and threatens to and will prosecute such suits to judgment unless restrained from so doing by order of this court.

XLIX.

Plaintiffs respectfully show to the Court that said purported License No. 17, and said purported License No.

57, and said National Agricultural Act insofar as it purports to authorize said purported Licenses, are, and each of them is, and at all times have been void under the Constitution and Laws of the United States for the following reasons and in the following respects:

(a) Because said National Agricultural Adjustment Act is not a regulation of interstate commerce.

(b) Because said purported License No. 17 recited and found contrary to fact that the marketing of milk in said territory designated therein as the "Los Angeles Sales Area" is in the current of interstate commerce and inextricably intermingled with it.

(c) Because said purported License No. 57 recites and finds contrary to fact that the marketing of milk for distribution in the Los Angeles Sales Area and the distribution thereof are entirely in the current of interstate commerce, because the said marketing and distribution are partly interstate and partly intra-state commerce and so inextricably intermingled that said interstate commerce portion can not be effectively regulated or licensed without licensing that portion which is intra-state commerce.

(d) Because said purported License No. 17 was an attempt to regulate the business of production and sale of fluid milk within a portion of the State of California and did not in any way constitute a regulation of interstate commerce.

(e) Because said purported License No. 57 is an attempt to regulate the business of distributing, marketing and handling milk and cream in the Los Angeles Sales Area only and entirely within the State of Cali-

fornia and does not in any way constitute a regulation of interstate commerce.

(f) Because said purported License No. 17 was an attempt to regulate purely intra-state business by Federal authorities under the guise of regulating interstate and foreign commerce.

(g) Because said purported License No. 57 is an attempt to regulate purely intra-state business by Federal authorities under the guise of regulating interstate and foreign commerce.

(h) Because said License No. 57 does not contain any regulation of interstate or foreign commerce or license distributors, or any distributor, to engage in the handling of milk or cream in the current of interstate or foreign commerce, and said license No. 17 did not contain any regulation of interstate or foreign commerce.

(i) Because said National Agricultural Adjustment Act has no application to the plaintiffs herein, or any of them, or to other persons similarly situated in the State of California.

(j) Because said National Agricultural Adjustment Act insofar as it attempts to confer upon the Secretary of Agriculture the power to issue licenses and to thereby fix such terms and conditions as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products thereof and the financing thereof is an unlawful and unconstitutional delegation of legislative authority to an executive officer and violates Article I, of the Constitution of the United States.

(k) Because said National Agricultural Adjustment Act insofar as it attempts to confer upon the Secretary of Agriculture the power to hear, try and determine as to violations of the terms and conditions of such license and to suspend or revoke such license for the violation of the terms and conditions thereof is an unlawful and unconstitutional delegation of judicial power to an executive officer and violates Article III of the Constitution of the United States.

(l) Because said License No. 17 as issued by said Secretary of Agriculture was not authorized by said National Agricultural Adjustment Act.

(m) Because said License No. 57 as issued by said Secretary of Agriculture is not authorized by said National Agricultural Adjustment Act.

(n) Because the issuance of said License No. 17 constituted an unlawful assumption and usurpation of legislative power by the Secretary of Agriculture.

(o) Because the issuance of said License No. 57 constitutes an unlawful assumption and usurpation of legislative power by the Secretary of Agriculture.

(p) Because said License No. 17 constituted an unlawful and unwarranted interference with the right of these plaintiffs, and each of them, to contract with producers.

(q) Because said License No. 57 constitutes an unlawful and unwarranted interference with the rights of these plaintiffs to contract with the producers.

(r) Because said purported License No. 17 was an attempt to impose a charge upon one individual for the benefit of other private individuals, corporations or enterprises.

(s) Because said purported License No. 57 is an attempt to impose a charge upon one individual for the benefit of other private individuals, corporations or enterprises.

(t) Because said purported License No. 17 attempted to fix and levy an arbitrary charge to be paid to a private corporation in which plaintiffs are not members or stockholders without any legislative authority and contrary to the provisions of Section VIII of Article I of the Constitution of the United States.

(u) Because said purported License No. 57 attempts to fix and levy an arbitrary charge to be paid to the Market Administrator without any legislative authority and contrary to the provisions of Section VIII of Article I of the Constitution of the United States.

(v) Because said purported License No. 17 was an attempt by Federal authorities to fix commodity prices to producers, distributors and consumers in the course of conducting a business which is not burdened with a public interest or duty and which is not subject to price regulation by Federal authorities or otherwise.

(w) Because said purported License No. 57 is an attempt by Federal authorities to fix commodity prices to producers, distributors and consumers in the course of conducting a business which is not burdened with a public interest or duty and which is not subject to price regulation by Federal authorities or otherwise.

(x) Because said purported License No. 17 was an attempt to deprive these plaintiffs of their property without due process of law in violation of plaintiffs rights and particularly of the Fifth Amendment of the Constitution of the United States.

(y) Because said purported License No. 57 deprives these plaintiffs of their property without due process of law in violation of plaintiffs rights and particularly of the Fifth Amendment of the Constitution of the United States.

(z) Because said purported License No. 57 insofar as it attempts to provide as one of the terms and conditions thereof that each and every distributor shall fulfill any and all of his obligations which shall have arisen, or which may hereafter arise in connection with, by virtue of, or pursuant to said License No. 17 is retroactive and is an attempt to enact an ex post facto law contrary to the provisions of Section 9, of Article I, of the Constitution of the United States.

L.

Plaintiffs allege that the Act of Congress above referred to, the rules and regulations promulgated by the Secretary of Agriculture and approved by the President and said licenses issued by the Secretary of Agriculture do not apply to said plaintiffs, or either of them, or to their said business, and that if said Act is held to embrace the business of these plaintiffs, then Congress has exercised the power of legislation over a subject and matter over which it has no rightful power under the Constitution of the United States; plaintiffs believe that the rules and regulations and said licenses promulgated by the Secretary of Agriculture contravene the terms of the Act of Congress above referred to and are not applicable to these plaintiffs, or either of them, yet, nevertheless, the defendants to this supplemental bill of complaint are attempting to enforce the same against plaintiffs, and each of them, and intend to deprive the individual plain-

tiff and the stockholders of the plaintiff corporations, and each of them, of the opportunity to support themselves and their families and intend to prevent plaintiffs and each of them from making an income from the businesses built up prior to the passing of said Act of Congress, and that the cancellation and the revocation of the licenses of plaintiffs, if enforced, will cause the assets of plaintiffs and each of them to be deteriorated, and the good will created by plaintiffs to be destroyed, and thereby plaintiffs and each of them will be irreparably injured, and against such wrongful acts of said defendants and each of them, the plaintiffs and each of them can only be relieved by a decree of this Court adjudging that the National Agricultural Adjustment Act and/or said Licenses Nos. 17 and 57 are either void or inapplicable to plaintiffs and each of them. That the damages that plaintiffs, and each of them have suffered and will suffer as a result of being deprived of a license to conduct a business are of a speculative and uncertain character, incapable of being assessed by a jury upon a trial of an action at law wherein the constitutionality of the Act of Congress, the propriety of said rules and regulations and the limits and validity of the licenses may be tried, and therefore plaintiffs, and each of them, charge that they are entitled to be relieved by a decree of this Court declaring their rights, which decree should be enforced by a writ of injunction directed to the defendants and each of them and enjoin and restrain them and each of them from the commission of the wrongful acts herein complained of.

Plaintiffs and each of them believe, and therefore allege, that at said hearing conducted before the officers

and employees of said Secretary of Agriculture as aforesaid, no one of said plaintiffs received a fair and/or impartial trial or hearing.

LI.

That plaintiffs and each of them are informed and believe, and therefore allege on such information and belief, that defendant Pierson M. Hall, as United States District Attorney for the Southern District of California, intends to and will institute proceedings against said plaintiffs and each of them to enforce the order of said H. A. Wallace, as Secretary of Agriculture, revoking said License No. 57 as to said plaintiffs and each of them and to prevent said plaintiffs and each of them from continuing in business as hereinbefore set forth, and to enforce the penalties prescribed by said National Agricultural Adjustment Act against the plaintiffs and each of them for continuing the operation of their respective businesses after the revocation of License No. 57 as to each of them, as hereinbefore set forth.

LII.

Plaintiffs respectfully show the Court that the acts and threatened acts of the defendants above set forth are in violation of the Constitution and laws of the United States and the rights of plaintiffs thereunder in the respects and for the reasons set forth in paragraphs XXX and XLIX, supra.

LIII.

Plaintiffs further show that even if the Court should hold that said purported license and Act were valid, so far as the regulation of the marketing of milk in interstate commerce is concerned, nevertheless both said purported license and Act, and the acts and threatened acts

of defendants herein set forth, are invalid as to these plaintiffs, for the reason that they are not engaged in the marketing of milk for distribution in interstate commerce, as is above more particularly set forth.

WHEREFORE, plaintiffs pray that, in view of the irreparable injury which is being and is about to be inflicted upon plaintiffs and each of them, and the multiplicity of penalty suits to which plaintiffs and each of them will be subjected but for the restraining process of this Court, a restraining order at once issue, restraining and enjoining the defendants and each of them, their agents, attorneys, successors and employees, from making any of the demands and committing any of the acts with relation to these plaintiffs, or any of them, above mentioned; and restraining and enjoining each of the defendants, their agents, attorneys, successors and employees, from in any manner interfering with plaintiffs, or any of them, in the conduct of their respective businesses, by any form of civil or criminal proceeding, or otherwise, and from enforcing or attempting to enforce as against the said plaintiffs, or any of them, any of the terms and provisions of said Licenses Nos. 17 and 57, and from collecting or attempting to collect from plaintiffs, or any of them, any of the sums of money demanded under the terms and provisions of said Licenses Nos. 17 and 57, as hereinbefore set forth, either by civil or criminal proceedings, or otherwise, or from commencing, prosecuting or maintaining any action against any of the plaintiffs for the collection of any of said sums, or from taking any action against the said plaintiffs, or any of them, by any form of civil or criminal proceedings or otherwise to enforce any penalty or penalties prescribed in the Na-

tional Agricultural Adjustment Act, or in any rules or regulations purported to be issued thereunder by the Secretary of Agriculture; that said restraining order contain such instructions or further orders as to the Court shall seem fit and proper.

That defendants and each of them be ordered to show cause why a temporary injunction of like character should not issue and that upon the hearing of said order to show cause a temporary injunction of like character issue, and that upon the final hearing said temporary injunction be made permanent.

Plaintiffs further pray that this court adjudge and decree:

(a) That the Act of Congress known as the National Agricultural Adjustment Act is unconstitutional and void, or is not applicable to these plaintiffs or their said businesses;

(b) That the rules and regulations described in this supplemental bill of complaint, as promulgated by the Secretary of Agriculture, are null and void, or are inoperative and inapplicable as to the plaintiffs herein;

(c) That the Licenses Nos. 17 and 57, and each of them, as promulgated by the Secretary of Agriculture, were and are void, invalid and ultra vires, or that said licenses and each of them were and are inoperative and inapplicable to the plaintiffs herein;

(d) That plaintiffs are entitled to the general relief sought herein and that such other writs do issue herein as to the Court shall seem fit and proper and necessary for the protection of plaintiffs; and

(e) That plaintiffs have their costs incurred herein and any and all such other, further and different relief as in equity they may be entitled to.

LEWIS D. COLLINGS
Lewis D. Collings
EDWARD M. SELBY
Edward M. Selby
WALTER F. HASS
Walter F. Haas
HAROLD C. JOHNSTON
Harold C. Johnston
Attorneys for Plaintiffs.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

CHARLES J. KURTZ, being first duly sworn, deposes and says: That he is one of the plaintiffs in the above entitled action; that he has read the foregoing supplemental bill for injunction and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true.

CHARLES J. KURTZ
Charles J. Kurtz

Subscribed and sworn to before me this 8th day of August, 1934,

(SEAL)

CELIA BOLSON
Celia Bolson
Notary Public in and for the County of Los Angeles, State of California.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

GEO. O. STODDARD, being first duly sworn, deposes and says: that he is the Secretary of Western Holstein Farms, Inc., a corporation one of the plaintiffs herein, and that he therefore verifies the foregoing supplemental bill for injunction on behalf of said corporation, plaintiff; that he has read the said supplemental bill for injunction and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true.

GEO. O. STODDARD
Geo. O. Stoddard

Subscribed and Sworn to before me this 8th day of August, 1934,
(SEAL)

CELIA BOLSON
Celia Bolson
Notary Public in and for the County of Los Angeles, State of California.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

B. FRATKIN, being first duly sworn, deposes and says: That he is the President of the Valley Dairy Co., Inc., a corporation, one of the plaintiffs herein, and that he therefore verifies the foregoing supplemental bill for injunction on behalf of said corporation, plaintiff; that he has read the said supplemental bill for injunction and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein

stated on information or belief, and as to such matters that he believes it to be true.

B. Fratkin
B. Fratkin

Subscribed and sworn to before me this 8th day of August, 1934,

(Seal) Celia Bolson
Celia Bolson
Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

Edward M. Selby, being first duly sworn, deposes and says: That he is now, and was at all times in the foregoing supplemental bill for injunction mentioned, one of the attorneys of record for the plaintiff, The Lucerne Cream and Butter Company, a corporation, and that he verifies the foregoing supplemental bill for injunction on behalf of said corporation, plaintiff, by reason of the fact that there is no officer of said corporation plaintiff at the present time within the Southern District of California; that he has read the said supplemental bill for injunction and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true.

Edward M. Selby
Edward M. Selby

Subscribed and sworn to before me this 8th day of August, 1934,

(SEAL) CELIA BOLSON

Celia Bolson

Notary Public in and for the County of Los Angeles, State of California.

(NOTE—Exhibits "A" and "B" appearing herein are set forth supra in Bill of Complaint.)

Docket No. 161

EXHIBIT C

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
LICENSE SERIES—LICENSE NO. 57
LICENSE FOR MILK
LOS ANGELES, CALIFORNIA, SALES AREA
WITH THE FOLLOWING EXHIBITS

Exhibit A
Marketing Plan

Exhibit B
Rules for Establishment of Bases

Exhibit C
Schedule of Unfair Trade Practices and Minimum Resale Prices

SUPERSEDES LICENSE NO. 17
of November 20, 1933.

Issued by the Acting Secretary of Agriculture,
May 31, 1934.

Effective date June 1, 1934 (12:01 a.m., eastern standard time).

LICENSE FOR MILK
LOS ANGELES, CALIFORNIA, SALES AREA
LICENSE SERIES—LICENSE NO. 57

Whereas, it is provided by section 8 of the Act as follows:

"Section 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power—

"(3) To issue licenses permitting processors, associations of producers and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. * * *

"(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof, and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this title"; and

Whereas, the Secretary has determined to issue licenses as hereinafter provided, pursuant to section 8 (3) of said Act; and

Whereas, the Secretary finds that the marketing of milk for distribution in the Los Angeles Sales Area and the distribution thereof are entirely in the current of

interstate commerce because the said marketing and distribution are partly interstate and partly intrastate commerce and so inextricably intermingled that said interstate commerce portion cannot be effectively regulated or licensed without licensing that portion which is intrastate commerce;

Now, therefore, the Secretary of Agriculture, acting under the authority vested in him as aforesaid;

Hereby licenses each and every distributor to engage in the business of distributing, marketing or handling milk or cream as a distributor in the Los Angeles Sales Area, subject to the following terms and conditions:

I.

As used in this License, the following words and phrases shall be defined as follows:

A. "Producer" means any person, irrespective of whether any such person is also a distributor, who produces milk in conformity to the applicable health requirements of the Los Angeles Sales Area for milk to be sold for consumption as whole milk in the Los Angeles Sales Area.

B. "Distributor" means any of the following persons, irrespective of whether any such person is a producer or an association of producers, wherever located or operating, whether within or without the Los Angeles Sales Area, engaged in the business of distributing, marketing, or in any manner handling, in whole or in part, whole milk or cream for ultimate consumption in the Los Angeles Sales Area.

1. Persons

(a) who pasteurize, bottle or process milk or cream;

(b) who distribute milk or cream at wholesale or retail (1) to hotels, restaurants, stores or other establishments for consumption on the premises, (2) to stores or other establishments for resale, or (3) to consumers;

(c) who operate stores or other establishments selling milk or cream at retail for consumption off the premises.

2. Persons who purchase, market or handle milk or cream for resale in Los Angeles Sales Area.

C. "Los Angeles Sales Area" means the territory within the corporate limits of the cities and towns of Los Angeles, Long Beach, Pasadena, South Pasadena, Glendale, Santa Ana, Fullerton, Anaheim, San Pedro, Santa Monica, San Bernardino, Riverside, Redlands, Pomona, Huntington Beach, Huntington Park, Whittier, Beverly Hills, Inglewood, Barstow; and the territory within the boundaries of Los Angeles County (including Santa Catalina Island), that part of San Bernardino County lying south of 35 degrees north latitude and west of 116 degrees west longitude, that part of Riverside County lying west of 116 degrees west longitude, and Orange County, all within the State of California.

D. "Secretary" means the Secretary of Agriculture of the United States.

E. "Act" means the Agricultural Adjustment Act approved May 12, 1933, as amended.

F. "Person" means individual, partnership, corporation, association or any other business unit.

G. "Subsidiary" means any person of, or over whom or which, a distributor or an affiliate of a distributor

has, or several distributors collectively have, either directly or indirectly, actual or legal control, whether by stock ownership or in any other manner.

H. "Affiliate" means any person and/or any subsidiary thereof, who or which has, either directly or indirectly, actual or legal control of or over a distributor, whether by stock ownership or in any other manner.

I. "Books and records" means books, records, accounts, contracts, memoranda, documents, papers, correspondence or other data pertaining to the business of the person in question.

J. "Market Administrator" means the person designated pursuant to exhibit A, which is attached hereto and made a part hereof.

II.

1. The schedule governing the prices at which, and the terms and conditions under which, distributors shall purchase and/or accept delivery of milk from producers, shall be that set forth in exhibit A. Any contract or agreement entered into between any distributor and producer, prior to the effective date of this License, covering the purchase and/or delivery of milk, shall be deemed to be superseded by the terms and provisions of this License in so far as such contract or agreement is inconsistent with any provision hereof.

2. Except as provided in exhibit A, no distributor shall purchase milk from producers except (a) those producers having bases, which are to be reported as provided in exhibit B, which is attached hereto and made a part hereof, and (b) new producers pursuant to the provisions of exhibit A.

The schedule governing the minimum prices at which, and the terms and conditions under which, milk and cream shall be sold and/or delivered by distributors shall be that set forth in exhibit C, which is attached hereto and made a part hereof. Any contract or agreement entered into between any distributor and any person, prior to the effective date of this License, covering the sale and/or delivery of milk and/or cream, shall be deemed to be superseded by the terms and provisions of this License in so far as such contract or agreement is inconsistent with any provision hereof.

3. No distributor shall purchase milk from any producer unless such producer authorizes such distributor, with respect to payments for milk purchased from such producer, to comply with the provisions of exhibit A.

4. (a) The distributors shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he may request, on and in accordance with forms of reports to be supplied by him, for the purposes of (1) assisting the Secretary in the furtherance of his powers and duties with respect to this License and/or (2) enabling the Secretary to ascertain and determine the extent to which the declared policy of the Act and the purpose of this License are being effectuated; such reports to be verified under oath. The Secretary's determination as to the necessity of and the justification for the making of any such reports, and the information called for thereby, shall be final and conclusive.

(b) For the same purposes and/or to enable the Secretary to verify the information furnished him on said

forms of reports, all the books and records of each distributor and the books and records of the affiliates and subsidiaries of each distributor, shall, during the usual hours of business, be subject to the examination of the Secretary. The Secretary's determination as to the necessity of and the justification for any such examination shall be final and conclusive.

(c) The distributors and their respective affiliates and subsidiaries shall severally keep books and records which will clearly reflect all the financial transactions of their respective businesses and the financial condition thereof.

(d) All information furnished the Secretary, pursuant to this paragraph, shall remain confidential in accordance with the applicable General Regulations, Agricultural Adjustment Administration.

5. No distributor shall purchase milk or cream from, or process or distribute milk or cream for, or sell milk or cream to, any other distributor who he has notice is violating any provisions of this License, without first reporting such violation to the Market Administrator.

6. The Secretary may, by designation in writing, name any person, including any officer or employee of the Government, to act as his representative in connection with any of the powers provided in this License to be exercised by the Secretary.

7. Each distributor who is obligated to report pursuant to paragraph 4 of section A, of exhibit A shall within thirty days after the effective date of the License, furnish to the Market Administrator a bond with good and sufficient surety thereon, satisfactory to the Market

Administrator (in an amount not in excess of the purchase value of the milk purchased by such distributor during any two successive delivery periods as designated by the Market Administrator) for the purpose of securing the fulfillment of such distributor's obligations as provided in exhibit A. Any distributor who commences to do business after the effective date of this License shall, as a condition precedent to engaging in such business, furnish to the Market Administrator a bond in conformity with the foregoing provision.

The Market Administrator may, (a) if satisfied from the investigation of the financial conditions of a distributor that such distributor is solvent and/or possessed of sufficient assets to fulfill his said obligations, or (b) if, pursuant to a State statute, a distributor has furnished a bond with good and sufficient surety thereon in conformity with the foregoing provision, waive the requirements of the bond as to such distributor. Such distributor may, upon a change in such circumstances, be required by the Market Administrator to comply with the foregoing requirement.

Each distributor who is unable to meet the requirements of the foregoing provisions, shall make periodic deposits, with the Market Administrator at such times, in such amounts, and in such manner as the Market Administrator may determine to be necessary in order to secure the fulfillment of such distributor's obligations as provided in exhibit A.

Each and every distributor shall fulfill any and all of his obligations which shall have arisen or which may hereafter arise in connection with, by virtue of, or pur-

suant to, the License for Milk in the Los Angeles Sales Area issued by the Secretary on November 16, 1933.

8. If any provision in this License is declared invalid, or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of such provision and of the remainder of this License and/or the applicability thereof to any other person, circumstance or thing shall not be affected thereby.

9. Nothing herein contained shall be construed in derogation of the right of the Secretary to exercise any powers granted him by the Act, and in accordance with such powers, to act in the premises whenever he shall deem it advisable.

10. This License shall take effect as to every distributor at the time and upon the date set forth herein above the signature of the Secretary.

11. In the event this License is terminated or amended by the Secretary, any and all obligations which shall have arisen, or which may thereafter arise in connection therewith, by virtue of or pursuant to this License, and any violation of this License which may have occurred prior to such termination or amendment, shall be deemed not to be affected, waived or terminated by reason thereof, unless so expressly provided in the notice of termination of, or the amendment to this License.

The Secretary hereby determines that an emergency exists which requires a shorter period of notice than three days, and that the period of notice with respect to the issuance of this License which is hereinafter provided is reasonable under the circumstances.

In Witness Whereof, I, R. G. Tugwell, Acting Secretary of Agriculture, do hereby execute in duplicate

and issue this License in the city of Washington, District of Columbia, on this 31st day of May, 1934, and pursuant to the provisions hereof, declare this License to be effective on and after 12:01 a. m., eastern standard time, June 1, 1934.

R. G. TUGWELL,
Acting Secretary of Agriculture.

EXHIBIT A

Marketing Plan

SECTION A. COST OF MILK TO DISTRIBUTORS.

1. Each distributor, except as hereinafter provided, shall be obligated to pay, in the manner hereinafter provided, the following prices per pound of butterfat contained in milk which he has purchased from producers, (including new producers as defined in section C of this exhibit) delivered f.o.b. distributors' plants in the Los Angeles Sales Area:

Class I – 55 cents.

Class II – The average price per pound of 92 score butter at wholesale in the Los Angeles Market as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased, plus 40 per cent of such amount, plus 12 cents.

Class III – The average price per pound of 92 score butter at wholesale in the Los Angeles Market as reported by the United States Department of Agriculture the delivery period during which

such milk is purchased, plus 40 per cent of such amount, plus 6 cents.

Class IV – The average price per pound of 92 score butter at wholesale in the Los Angeles Market as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased, plus or minus, as the case may be, ¼ cents for each one cent that such price is above or below 25 cents, plus 4 cents.

The term "delivery period" shall mean the period from the first to, and including, the last day of each month.

2. Class I milk means all milk sold or distributed by distributors as whole milk for consumption in the Los Angeles Sales Area.

Class II milk means all milk used by distributors to produce cream for sale or distribution by distributors as cream for consumption in the Los Angeles Sales Area.

Class III milk means all milk sold or used by distributors to produce ice cream and/or ice cream mix, for consumption in the Los Angeles Sales Area.

Class IV milk means the quantity of milk purchased, sold, used or distributed by distributors in excess of Class I, Class II and Class III milk.

Milk delivered to a distributors by producers during any delivery period and sold or distributed as milk or cream outside the Los Angeles Sales Area or sold by such distributor to another distributor (including any person who sells, uses or distributes such milk or cream

for ultimate consumption in any market with respect to which no License is in effect pursuant to section 8 (3) of the Act covering such purchase from producers and such sale as milk or cream) shall be accounted for by the first distributor as Class I or Class II milk, respectively, unless such first distributor on or before the date fixed for filing reports with the Market Administrator for such delivery period shall furnish to the Market Administrator proof satisfactory to the Market Administrator that such milk or cream has been utilized for a purpose other than sale, use or distribution for ultimate consumption as milk or cream, in which event such milk or cream shall be classified in accordance with such other use.

Any distributor purchasing milk and/or cream from another distributor shall, on or before the date fixed for filing reports with the Market Administrator, pursuant to paragraph 4 hereof, furnish to the distributor from whom he purchased such milk and/or cream, an affidavit as to the quantity of milk and/or cream sold, used or distributed in each of the classifications herein defined.

Any distributor, who does not sell or distribute whole milk for ultimate consumption in the Los Angeles Sales Area, may purchase milk from producers who do not have established bases. Such distributor

(a) shall not sell cream to other distributors for distribution and ultimate consumption in the Los Angeles Sales Area at a price less than the price at which such distributor sells similar cream for distribution and ultimate consumption

such milk is purchased, plus 40 per cent of such amount, plus 6 cents.

Class IV – The average price per pound of 92 score butter at wholesale in the Los Angeles Market as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased, plus or minus, as the case may be, ¼ cents for each one cent that such price is above or below 25 cents, plus 4 cents.

The term "delivery period" shall mean the period from the first to, and including, the last day of each month.

2. Class I milk means all milk sold or distributed by distributors as whole milk for consumption in the Los Angeles Sales Area.

Class II milk means all milk used by distributors to produce cream for sale or distribution by distributors as cream for consumption in the Los Angeles Sales Area.

Class III milk means all milk sold or used by distributors to produce ice cream and/or ice cream mix, for consumption in the Los Angeles Sales Area.

Class IV milk means the quantity of milk purchased, sold, used or distributed by distributors in excess of Class I, Class II and Class III milk.

Milk delivered to a distributors by producers during any delivery period and sold or distributed as milk or cream outside the Los Angeles Sales Area or sold by such distributor to another distributor (including any person who sells, uses or distributes such milk or cream

for ultimate consumption in any market with respect to which no License is in effect pursuant to section 8 (3) of the Act covering such purchase from producers and such sale as milk or cream) shall be accounted for by the first distributor as Class I or Class II milk, respectively, unless such first distributor on or before the date fixed for filing reports with the Market Administrator for such delivery period shall furnish to the Market Administrator proof satisfactory to the Market Administrator that such milk or cream has been utilized for a purpose other than sale, use or distribution for ultimate consumption as milk or cream, in which event such milk or cream shall be classified in accordance with such other use.

Any distributor purchasing milk and/or cream from another distributor shall, on or before the date fixed for filing reports with the Market Administrator, pursuant to paragraph 4 hereof, furnish to the distributor from whom he purchased such milk and/or cream, an affidavit as to the quantity of milk and/or cream sold, used or distributed in each of the classifications herein defined.

Any distributor, who does not sell or distribute whole milk for ultimate consumption in the Los Angeles Sales Area, may purchase milk from producers who do not have established bases. Such distributor

(a) shall not sell cream to other distributors for distribution and ultimate consumption in the Los Angeles Sales Area at a price less than the price at which such distributor sells similar cream for distribution and ultimate consumption

nearest the location where milk is processed into such cream by such distributor, plus the reasonable cost of transporting such cream to the Los Angeles Sales Area.

(b) Shall not be subject to any of the terms or provisions of this exhibit, except as set forth in subdivision (a) above, with respect to milk purchased from producers who do not have established bases; but

(c) may at any time, with respect to such milk, be required by the Market Administrator to submit reports, containing such information as the Market Administrator may require, similar to the kind of information reported by other distributors pursuant to paragraph 4 hereof, which information shall be kept confidential in the manner provided in such paragraph.

3. The established base for each producer shall be the quantity of milk allotted to such producer in accordance with the provisions of exhibit B.

The delivered base for each producer shall be that quantity of milk delivered by such producer to distributors, which is not in excess of 90 per cent of the established base of such producer.

The delivered base for each distributor required to report pursuant to paragraph 4 (b) shall be the quantity of milk produced by such distributor and sold or distributed by him as Class I, Class II, Class III and Class IV milk which is not in excess of 90 per cent of the established base of such distributor. For the purpose of such computation and adjustments the amount

of exemption to which any distributor is entitled pursuant to the terms of paragraph 4 (b) shall be ratably deducted from (a) such distributors' total sales and uses not in excess of his delivered base, and (b) such distributors' total sales or uses in excess of his delivered base.

The Market Administrator shall, as far as may be practicable, adjust as to each delivery period, the percentage of established base constituting delivered base in order that the blended price for delivered base computed pursuant to paragraph 5 of section A, for such delivery period may approximate the Class I price set forth in paragraph I of section A; provided, however, that such percentage shall in no event be less than 80 per cent and not more than 100 per cent.

4. (a) On or before the 5th day of each delivery period each distributor to whom milk or cream was delivered during the preceding delivery period by (1) producers (who are not also distributors) and/or (2) by distributors (other than those who operate only stores or other establishments) shall report to the Market Administrator with respect to milk delivered during such delivery period, in a manner prescribed by the Market Administrator:

(1) The actual deliveries, if any, in terms of butterfat pounds (at each location) of the producers (and new producers) supplying such distributor, the total quantity of milk represented by the delivered bases of all such producers, and the total quantity of milk represented by the excesses over delivered bases of all such producers;

(2) The actual deliveries, if any, made to him by other distributors;

(3) The quantities of milk delivered in terms of butterfat pounds which were sold, used or distributed by him as Class I, Class II, Class III and Class IV milk, respectively; and

(4) Such other information as the Market Administrator may request for the purpose of performing the provisions of this exhibit.

(b) On or before the 5th day of each delivery period, each distributor who produces milk distributed by him as whole milk or cream shall submit reports to the Market Administrator containing the same information with respect to the preceding delivery period required in subdivision (a) of this paragraph, and in addition thereto the total amount of milk produced by such distributor and sold during such delivery period as Class I, Class II, Class III and Class IV milk.

Each such distributor shall be obligated to account to the Market Administrator for all of his sales of Class I, Class II, Class III, and Class IV milk, at the prices indicated in paragraph 1 of this Section, except that a distributor who neither.

(1) sells any part of the milk produced by him to other distributors (other than those who operate only stores or similar establishments) or to manufacturing plants, nor

(2) purchases milk from other producers or distributors for distribution as whole milk or cream,

shall as to each delivery period (except the first three full delivery periods during which he sells or delivers milk as

a new producer) receive an exemption for that daily average volume of his sales and uses up to and including 20 pounds of butterfat (such amount to be adjusted from time to time by the Market Administrator so as to approximate the average amount of Class I and Class II milk handled per retail route by all distributors), which exemption shall be ratably deducted from such distributors' Class I, Class II, Class III, and Class IV sales or uses in proportion to the respective total amounts of such sales or uses in such classes. No exemption made pursuant to this subdivision shall be included by the Market Administrator in his computations made pursuant to paragraph 5 hereof.

Nothing contained in this subdivision shall be construed to mean that the aforesaid exemption shall apply to any distributor other than a person who produces milk distributed by himself as whole milk or cream.

All information furnished the Market Administrator pursuant to this paragraph 4 shall remain confidential in accordance with the provisions of the applicable General Regulations, Agricultural Adjustment Administration, but any such information shall be submitted by the Market Administrator to the Secretary at any time upon the request of the Secretary.

5. With respect to each delivery period, the Market Administrator shall:

(a) Compute the total value, in each class, of all milk as reported by each and all distributors pursuant to paragraph 4, on the basis of the prices set forth in paragraph 1, making the appropriate adjustments as provided in section B, which com-

putation shall not include milk purchased by distributors from other distributors.

(b) Compute the total quantity of milk in terms of butterfat pounds represented by the delivered bases of all producers as reported pursuant to paragraph 4.

(c) Compute the value of the milk purchased, sold or used by all distributors in excess of the total delivered bases as reported pursuant to paragraph 4, of all producers excluding new producers by multiplying such excess quantity of milk in terms of butterfat pounds by the price provided for in paragraph 1 for Class IV milk.

(d) Compute the total amount to be paid to new producers by all distributors as reported pursuant to paragraph 4 on the basis of the prices set forth in section G of this exhibit.

(e) Compute the total value of the quantity of milk represented by the total delivered bases of all producers by subtracting from the amount obtained in subdivision (a) the amounts obtained in subdivisions (c) and (d).

(f) Compute the total adjusted value of the quantity of milk represented by the total delivered bases of all producers as reported by distributors, pursuant to paragraph 4, by adding to the total value of such milk, as computed in subdivision (e), the adjustments provided for in section C (1).

(g) Compute the blended price per butterfat pound for the quantity of milk represented by the total delivered bases of all producers by dividing the

amount obtained in subdivision (f) by the quantity of milk represented by the total delivered bases of all producers as determined in subdivision (b).

6. On or before the 10th day of each delivery period the Market Administrator shall notify all distributors who have reported pursuant to paragraph 4, of the blended price as determined above and of the Class IV price as provided for in paragraph 1 above.

Each such distributor shall pay to producers (including new producers) on or before the 15th day of each delivery period for milk delivered by such producers during the preceding delivery period subject to adjustments and deductions which are to be made pursuant to sections C and D of this exhibit:

(a) to producers at the blended price for the quantity of milk delivered by each producer represented by such producer's delivered base; and

(b) to producers at the Class IV price for the quantity of milk delivered by such producers in excess of such producers' delivered bases;

(c) to new producers at the price provided in section G.

Provided that no provision in this License shall be construed as controlling or restricting any producers' cooperative association, licensed as a distributor under this License, with respect to the actual deductions, or charges, dividends or premiums to be made by such association from and/or to its members; but no such deductions or charges may be made by any such producer's cooperative association from any of its members, to meet a current operating loss incurred by such pro-

ducers' cooperative association in its processing or distribution operations unless (a) expressly and specifically authorized by any such member to make such deduction or charge for such purpose, and (b) the producers' cooperative association notifies the Market Administrator of the same.

7. The Market Administrator shall maintain for each distributor an adjustment account:

(a) which shall be debited for the total value of the quantity of milk reported as received, sold, distributed or used by such distributor during the preceding delivery period computed pursuant to subdivision (a) of paragraph 5; and

(b) which shall be credited for the total value of the quantity of milk reported by such distributor pursuant to paragraph 4 (excluding milk delivered by other distributors) on the basis of the prices to be paid to producers (and new producers) pursuant to paragraph 6. Such credit shall be made after giving effect to the adjustments to be made pursuant to paragraph 1 of section C, and before giving effect to the adjustments and deductions provided for in sections C (2) and D of this exhibit.

Balances due to the Market Administrator on adjustment accounts with respect to milk purchased during any delivery period shall be paid to the Market Administrator on or before the 15th day of the following delivery period. Any funds so paid to the Market Administrator shall, as soon as reasonably possible, be paid out by him pro rata among distributors in proportion to the amount

of adjustments to which, but only to the extent to which, they are entitled.

8. Any error in computation of payments or any discrepancies in reports of distributors or in the adjustment accounts shall be adjusted when settlements are made with respect to the following delivery period. Whenever the Market Administrator has a balance on hand in excess of any adjustments to be made to distributors, he may distribute such balance or any part thereof in an equitable manner among producers in the market.

9. The Market Administrator and/or any functioning producers' cooperative, hereinafter called "any Association" ("functioning producers' cooperative" means an association which, in the opinion of the Market Administrator, is furnishing services to its members in keeping with the requirements of the terms of this License), shall at all reasonable times have the right to check sampling, weighing, and butterfat tests made by distributors, for the purpose of determining the accuracy thereof. In the event of a discrepancy between weights and tests reported by distributors and weights and tests determined by the Market Administrator and/or any Association, settlements shall be made by distributors upon the basis of such weights and such butterfat content as the Market Administrator may in each case decide.

10. Producers shall have the right to deliver milk to country stations, plants or platforms of distributors, using such method of transportation as they, in their discretion, may select. No distributor shall interfere with or discriminate against producers in the exercise of such right. At the request of the Market Administrator, each

distributor, shall from time to time, submit a verified report stating the actual transportation charges on all milk delivered to him f. o. b. any and all plants and country stations, for the purpose of permitting the Market Administrator to review such transportation charges and to determine the reasonableness thereof.

SECTION B. ADJUSTMENTS IN COST OF MILK TO DISTRIBUTORS.

1. Each distributor shall make the following deductions from the prices to be paid for milk purchased as provided in paragraph 1 of section A:

(a) In respect to Class I milk delivered by producers to a receiving station, 100 miles or more from the Los Angeles City Hall, four (4) cents per pound butterfat and such reasonable rates for transportation per pound butterfat contained in such milk, between such receiving station and the plant from which wholesale and retail routes of such distributor are loaded, as may be fixed by the Market Administrator, not however, in excess of the rates scheduled for common carriers by the California Railway Commission with respect to equivalent transportation.

(b) In respect to Class II and Class III milk delivered to a receiving station, 100 miles or more from the Los Angeles City Hall, 7 cents per pound butterfat, and 1/8th of the transportation charges provided in subdivision (a) of this paragraph with respect to Class I milk;

2. Unless the prior written consent of the Market Administrator is obtained for some other basis of computa-

tion, the adjustments in the cost of milk to distributors made pursuant to this section shall be computed on the following basis:

(a) the milk which was delivered to each distributor at locations in or nearest to the Los Angeles Sales Area, to the extent necessary to supply each such distributor with the milk sold, distributed or used by him as Class I milk, shall be classified as Class I milk;

(b) any excess beyond that quantity of milk classified pursuant to subparagraph (a) above, delivered to each distributor at locations in or nearest to the Los Angeles Sales Area, to the extent necessary to supply each such distributor with the milk sold, distributed or used by him as Class II milk, shall be classified as Class II milk.

SECTION C. ADJUSTMENTS IN PAYMENTS TO PRODUCERS.

1. Each distributor shall make the following deductions from the payments to be made to producers (excluding new producers) as provided in section A:

(a) In respect to all milk represented by the delivered bases of producers who deliver milk to such distributors at a receiving station, 100 miles or more from Los Angeles City Hall, the deductions provided in paragraph 1 (a) of section B.

2. Any distributor may, with the prior approval of the Market Administrator, make payments to producers in addition to the prices provided for in paragraph 6 of section A, provided that such additional payments are

made to all the producers supplying such distributor with milk of similar quality and grade. No distributor may accept services from or render services to a producer or an association of producers from whom he is purchasing milk without making a reasonable payment or charge, as the case may be, for such services.

SECTION D. DEDUCTIONS FROM PAYMENTS TO PRODUCERS.

1. Each distributor shall deduct ½ cent per pound butterfat from the payments to be made by him pursuant to section A in regard to all milk delivered to him, and shall pay over such deduction to the Market Administrator simultaneously with making payment to producers for milk purchased.

Each distributor, who also produces milk which is sold, used, or distributed as either Class I, Class II, Class III, or Class IV milk, shall, on or before the 15th day of each delivery period, pay to the Market Administrator ½ cent per pound butterfat with respect to all the milk produced by such distributor and sold, used, or distributed by him as Class I, Class II, Class III, or Class IV milk during the preceding delivery period.

2. Each distributor shall, in addition, deduct from the payments to be made by him pursuant to section A in regard to all milk delivered to him by producers who are not members of any association an amount which shall in no event exceed one cent per pound butterfat and which shall be used pursuant to subdivision (b) of paragraph 4 of this section. Such deductions shall be paid over to the Market Administrator, simultaneously with making payments to producers for milk purchased.

3. The Market Administrator, in his discretion, may at any time waive the foregoing payments, or any part thereof for any delivery period (in which event the deductions for payments so waived shall not be made by the distributors from payments to producers): PROVIDED, HOWEVER, that any such waiver shall be equal (a) among all producers with respect to the amounts paid to the Market Administrator pursuant to paragraph 1 above, and (b) among all producers not members of any Association with respect to the amounts deducted pursuant to paragraph 2 above.

4. The Market Administrator shall maintain separate accounts for the payments made to him pursuant to paragraphs 1 and 2. The Market Administrator shall apportion such monies in the following manner:

(a) The payments made pursuant to paragraph 1 shall be retained by the Market Administrator to meet his cost of operation; PROVIDED, HOWEVER, That any such funds which may remain over from such payments in excess of the cost of operation for any particular delivery period, shall be applied by the Market Administrator in meeting his cost of operation for the succeeding delivery period, and to the extent that it may be practical, the Market Administrator shall waive a portion of such deduction for the succeeding delivery period as hereinabove provided.

(b) The payments made pursuant to paragraph 2 shall be retained by the Market Administrator in a separate fund and shall be expended by him for the purpose of securing for producers who are not members of any association, market information, supervision of weights

and tests, guarantee against failure by distributors to make payments for milk purchased, and other similar benefits; PROVIDED, HOWEVER, That the Market Administrator may, in his discretion, employ the facilities and services of any agent or agents, and pay over such funds in such amount as he may determine to such agent or agents for the purpose of securing to such non-members the aforementioned benefits, if such benefits to non-members may be more efficiently and economically secured thereby. The Market Administrator shall pay over such funds to such agent or agents, if he determines to do so, only upon the consent of such agent or agents: (a) to keep its or their books and records in a manner satisfactory to the Market Administrator; (b) to permit the Market Administrator to examine its or their books and records, and to furnish the Market Administrator such verified reports or other information as the Market Administrator may from time to time request; and (c) to disburse such funds in the manner above provided.

(c) Whenever the Market Administrator has a balance on hand in either of the accounts provided for in subdivisions (a) and (b) of this paragraph, he may distribute such balance, or any part thereof, in an equitable manner, among the producers (including new producers); PROVIDED, HOWEVER, That any such distribution of the balance in the account provided for in subdivision (a) shall be made to all producers (including new producers), and any such distribution of the balance provided for in subdivision (b) shall be made only to all producers (including new producers) who are not members of any Association.

SECTION E. The Market Administrator, — His Designation, Duties, and Compensation.

The Secretary shall designate the Market Administrator who shall perform such duties as may be provided for him in the License. The Market Administrator so designated shall be subject to removal, at any time, by the Secretary. Within forty-five (45) days following the date upon which he enters upon his duties, the Market Administrator shall execute and deliver to the Secretary his bond in such amount as the Secretary may determine, with surety thereon satisfactory to the Secretary, conditioned upon the faithful performance of his duties as such Market Administrator. The Market Administrator shall be entitled: (a) to reasonable compensation, which shall be determined by the Secretary; (b) to borrow money to meet his cost of operation until such time as the first payments are made to him pursuant to section D of this exhibit, which monies shall be repaid out of the payments retained by the Market Administrator pursuant to paragraph 4, subdivision (a), of said section D; and (c) to incur such other expenses, including compensation for persons employed by the Market Administrator as the Market Administrator may deem necessary for the proper conduct of his duties, and the cost of procuring and continuing his bond, which total expense shall be deemed to be the cost of operation of the Market Administrator. The Market Administrator shall not be held personally responsible in any way whatsoever to any licensee or to any other person for errors in judgment, mistakes of fact or other acts, either of commission or omission, except for acts of dishonesty, fraud, or malfeasance in office.

The Market Administrator shall keep such books and records as will clearly reflect the financial transactions provided for in this License. The Market Administrator shall permit the Secretary to examine his books and records at all times, and furnish the secretary such verified reports or other information as the Secretary may, from time to time, request of him.

The Market Administrator shall have the right to examine the books and records of the distributors and the books and records of the affiliates and subsidiaries of each distributor for the purpose of (1) verifying the reports and information furnished to the Market Administrator by each distributor pursuant to this License and/or (2) in the event of the failure of any distributor to furnish reports or information as required by this License, obtaining the information so required.

SECTION F. Establishment of Milk Industry Board.

The Secretary may, in his discretion, at any time, establish a Milk Industry Board, which shall have representation of producers, distributors, and the public. In establishing the Milk Industry Board, the Secretary will give due consideration to the recommendations and nominations by various groups of producers, distributors and the public. The Milk Industry Board shall have such duties and powers as the Secretary may, from time to time, delegate to it in order to effectuate the provisions and purposes of this License. The Secretary may further, in his discretion, authorize and direct the Market Administrator to pay over to the Milk Industry Board for the purpose of meeting its general expenses, a portion

of the monies paid to the Market Administrator for his cost of operation, pursuant to section D of this exhibit, providing that such portion shall in no event exceed 1-16th cent per pound of butterfat contained in milk for which such payment is made.

SECTION G. NEW PRODUCERS.

1. New producers shall be those producers whose milk was neither being purchased by distributors nor being distributed in the Los Angeles Sales Area within 90 days prior to the effective date of this License.

2. Each distributor upon first receiving milk from any producer shall immediately report to the Market Administrator (1) the name of such producer, (2) the date on which such producer's milk was first received, and (3) whether or not such producer is a new producer.

3. Each distributor shall pay to each new producer for all milk delivered by or handled for such new producer from the date when milk is first received to the end of the third full delivery period after such date (excluding any emergency period during which such producer receives payment pursuant to paragraph 4 hereof), the Class IV price set forth in paragraph 1 of section A.

The Market Administrator shall allot a base to each new producer prior to the expiration of the first delivery period during which his milk is being sold in the Los Angeles Sales Area, which base shall be allotted in accordance with the provisions of exhibit B hereof. Provided, however, That such base shall not be effective for the purposes of exhibit A until the expiration of such third full delivery period.

4. During the emergency period when the normal supply of milk from producers who have established bases is not sufficient to meet the Class I requirements of any distributor, such distributor may, with the prior approval of the Market Administrator purchase milk of any producer who has no base; Provided, however, That in any such event, the producer selling such milk shall be paid for the same depending upon the ultimate use of such milk and at the prices as provided for in paragraph 1, section A, and such payment shall not be included in the computation as provided in paragraph 5 of section A, but shall be reported separately to the Market Administrator by the distributor who purchased the milk from such producer.

EXHIBIT B

Rules for Establishment of Bases

1. For the purposes of the License, the term "established base" as used in respect to any producer shall mean:

(a) In the case of producers for whom bases are recorded in the files and records of Milk Producers, Inc., (a non-profit corporation organized under the laws of the State of California) the quantity of butterfat recorded as such bases in the files and records of Milk Producers, Inc.; Provided, however, That Milk Producers, Inc. has given the Market Administrator access to such files and records.

(b) In the case of producers for whom no bases are recorded in the files and records of Milk

Producers, Inc., bases shall be allotted by the Market Administrator, which bases shall be equitable as compared with the bases established pursuant to subdivision (a) above.

2. The Market Administrator may make such revisions in the bases of any and all producers as he may, from time to time, deem necessary or advisable, to the end that such bases may be equitable as among producers and that the total of all established bases may, so far as practical, be equal to the total quantity of milk sold or used by distributors as Class I and Class II milk.

3. Every distributor shall, within ten days of the effective date of this License, submit to the Market Administrator written reports, verified under oath, containing the following information (1) with respect to each producer who has delivered milk to such distributor and (2) for each calendar month during the years of 1933 and 1934 or such portion thereof as the producer may have delivered milk:

(a) The total pounds of delivered milk.

(b) The average percentage of butterfat in such delivered milk.

(c) The total pounds of butterfat in such delivered milk.

Each distributor required to report pursuant to paragraph 4 of section A of exhibit A shall, in addition to the foregoing information, include in the report submitted by him a statement containing the following in-

formation with respect to each calendar month during the years 1933 and 1934 or such portion thereof as such distributor may have distributed or sold milk produced by himself: (a) the total quantity of milk produced by him and sold by him as Class I, Class II, Class III and Class IV milk, (b) the average percentage of butterfat in such milk, and (c) the total number of pounds of butterfat in such milk.

4. When bases are established for producers, as hereinabove provided, the Market Administrator shall notify each distributor of the bases of the producers, including those producers who are members of any functioning producers' association who are delivering milk to such distributor. Before the expiration of the first three full delivery periods that the milk of a new producer is sold to distributors, the Market Administrator shall notify the distributors of the base of such new producer.

5. A producer with a base, whether landlord or tenant, may retain his base when moving his entire herd from one farm to another farm.

6. A landlord who rents on shares is entitled to the entire base to the exclusion of the tenant, if the landlord owns the entire herd. Likewise, the tenant who rents on shares is entitled to the entire base to the exclusion of the landlord if the tenant owns the entire herd. If the cattle are jointly owned by tenant and landlord, the base shall be divided between the joint owners according to the ownership of the cattle if and when such joint owners terminate the tenant-landlord relationship.

7. Any producer who voluntarily ceases to market milk pursuant to the terms and provisions of this License

for a period of more than forty-five (45) consecutive days shall forfeit his base. In the event that he thereafter commences to market milk pursuant to the terms and provisions of this License, he shall be treated for the purposes of these rules as if he were a new producer.

8. A producer may at any time, on notice to the Market Administrator, relinquish his base: Provided, however, That such producer shall thereafter be treated as a new producer on having a base reallotted to him.

9. Any producer may transfer (a) his base to any person upon the sale of his herd to such person, (b) any portion of his base to any person upon a sale of a corresponding portion of his herd to such person. No such transfer shall be effective until written notice thereof is received by the Market Administrator.

10. Any producer whose average monthly delivery of milk for any three consecutive months is less than seventy-five (75) per cent of his base will thereby establish a new base equal to such average monthly delivery.

EXHIBIT C

Schedule of Unfair Trade Practices and Minimum Resale Prices

1. To effectuate the purposes of this License and to aid in the enforcement of the provisions thereof, the sale of the following articles in the Los Angeles Sales Area by distributors at prices below the minimum prices

hereinafter set forth is prohibited. Such minimum prices shall be as follows:

	Retail (cents)	Wholesale (cents)	to Vendors (cents)
GRADE A MILK (Raw or Pasteurized)			
10 gallon cans		230	
3 gallon cans		70	65
2 gallon cans		48	45
1 gallon cans		26	23
Quarts	9	8	6½
Pints	6	5	4
Third Quarts	—	4	3
Half Pints	—	3	2
COFFEE CREAM (approximately 22 percent butterfat)			
3 gallon cans		275	
2 gallon cans		185	
Quarts	27	25	22
Pints	16	15	13
Half Pints	9½	8½	7
TABLE CREAM (approximately 27 percent butterfat)			
3 gallon cans		335	
2 gallon cans		225	
Quarts	33	30	27
Pints	20	18	16
Half Pints	11½	10½	9

Whipping Cream (Approximately 38 percent butterfat)			
3 gallon cans		450	
2 gallon cans		305	
Quarts	44	40	37
Pints	25	22	20
Half Pints	15	13½	12

2. The foregoing price schedule is without prejudice to the right of any distributor who asserts that such minimum prices are in excess of the prices necessary to accomplish the purposes set forth in paragraph 1 of this exhibit, to a hearing on the question of a modification *of* amendment of this License, in accordance with the applicable General Regulations, Agricultural Adjustment Administration.

3. The foregoing minimum prices shall not be applicable to any sales to any public unemployment relief agency (whether local, state or federal), to any private unemployment relief agency cooperating with or accredited by any public unemployment relief agency to any charitable institution or agency, to any hospital in connection with its charitable operations or to any government agency (whether local, state or federal) when such sales are upon competitive bids.

4. No distributor, or its officers, employees, or agents, shall employ any method or device whereby any article is sold or offered for sale at below the foregoing minimum prices, whether by discount, rebate, redeemable certificate, stamps, or tickets, free services or merchandise,

credit for articles returned, loans or credit outside the usual course of business, or combining prices for such articles together with another commodity sold, or by subsidy given for business or assistance in procuring business.

EXHIBIT "D"

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
WASHINGTON, D. C.

I, James K. Knudson, Acting Chief Hearing Clerk of the United States Department of Agriculture, Agricultural Adjustment Administration, pursuant to General Regulations, Series 7 thereof, do hereby certify:

1. That there has been filed in the office of the said Chief Hearing Clerk, a certain document in connection with a hearing held pursuant to Section 8 (3) of the Agricultural Adjustment Act, relating to the revocation and suspension of a certain license, to-wit:

CHAS. J. KURTZ, doing business under the fictitious firm name of GOLDEN WEST CREAMERY COMPANY

Case No. 17-1-4

which said document is now on file in the office of the Chief Hearing Clerk, and is as follows: Findings of Fact and Order of the Secretary Signed by H. A. Wallace, Secretary of Agriculture on the 28th day of July, 1934.

2. A true and correct copy of said document is attached hereto.

WITNESS my hand and official seal this 28th day of July, A.D., 1934.

(SEAL) JAMES K. KNUDSON,
Acting Chief Hearing Clerk United States Department of Agriculture Agricultural Adjustment Administration

(Signed) JOSEPH A. WALSH
Deputy Hearing Clerk.

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
WASHINGTON, D. C.

In the Matter of CHAS. J. KURTZ, doing business under the fictitious firm name of GOLDEN WEST CREAMERY COMPANY	Before the Secretary of Agriculture Case No. 17-1-4

FINDINGS OF FACT AND ORDER OF THE SECRETARY

On November 16, 1933, the Secretary of Agriculture duly issued License No. 17, License for Milk—Los Angeles Milk Shed, effective November 20, 1933, and continuously since said date Charles J. Kurtz, doing business under the fictitious firm name of Golden West Creamery Company, has been a distributor of fluid milk for consumption in the Los Angeles Sales Area and was a licensee under said License No. 17 from the effective date of said License No. 17 until the termination of said License No. 17 on May 31, 1934.

On February 21, 1934, a written order of the Secretary, as provided for in General Regulations, Series 3,

Sections 200 and 201, requiring respondent to show cause on or before the 5th day of March, 1934, why his said License No. 17 should not be revoked or suspended by the Secretary, was duly served upon the respondent.

The said Order to Show Cause contained the following statements of the alleged violations of the terms and conditions of the license by the respondent:

"(1) That said licensee, his officers, employees and agents, at divers times since November 20, 1933, has violated the terms and conditions of said license.

"(2) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 1, of said license by purchasing fluid milk for distribution as fluid milk in the Los Angeles Sales Area at prices and under terms and conditions different from those provided for in said paragraph and as set forth in Exhibit "A" of the license.

"(3) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 3 of said license, in that he has purchased and distributed fluid milk in violation of the terms and conditions as set forth in the Production and Surplus Control Plan provided for in Exhibit "C" of the license.

"(4) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 4 (a) of said license by failing and refusing to file reports and statements with the Chairman of the Los Angeles Milk Industry Board, as provided for in said paragraph.

"(5) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 4 (b) of said license by purchasing milk from producers for distribution as Grade "A" market milk in violation of the terms and conditions of said paragraph.

"(6) That said Licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 4 (b) of said license by purchasing milk from producers for distribution as Grade "A" market milk in violation of the terms and conditions of said paragraph, in that he has purchased fluid milk for consumption in the Los Angeles Sales Area from producers without being authorized by said producers to make the deductions as provided for in said paragraph of the license, and without making said deductions.

"(7) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 4 (b) of said license by failing and refusing to pay to the Los Angeles Milk Industry Board the amounts deducted from producers, as provided for in said paragraph of the license.

"(8) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 4 (b) of said license by failing and refusing to pay as a distributor to the Los Angeles Milk Industry Board the amounts therein required to be paid by him as a distributor.

"(9) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 4 (c) of said license by pur-

chasing milk for distribution as Grade "A" market milk from producers in violation of the terms and conditions of said paragraph of said license.

"(10) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 4 (c) of said license by purchasing milk for distribution as Grade "A" market milk from producers in violation of the terms and conditions of said paragraph of said license, and by failing and refusing to make the payments to the Los Angeles Milk Industry Board, required by said paragraph of said license.

"(11) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 4 (d) of said license by failing and refusing to comply with the terms and conditions of said paragraph of said license.

"(12) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 5 (a) of said license by failing and refusing to comply with the terms and conditions of his license, as set forth in said paragraph.

"(13) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 5 (b) of said license by failing and refusing to comply with the terms and conditions of his license, as set forth in said paragraph.

"(14) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 5 (a) and (b) of said license by purchasing milk for distribution as Grade "A" market

milk in the Los Angeles Sales Area from producers who are not members of any of the associations of producers listed in Par. 4 of Article III of said license without authorization from such producer to deduct, or cause to be deducted by the particular association of producers, if any, of which any such producer is a member, each month, certain sums therein required to be deducted and paid to Producers Arbitration Committee, Inc., or to its successor, Milk Producers, Inc., and without paying said sums to Milk Producers, Inc.

"(15) That said licensee, his officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Par. 14 of said license by failing and refusing to comply with the terms and conditions of his license, as set forth in said paragraph."

In response to telegraphic request by counsel for respondent in the above entitled case, the time for filing his answer to said Order was extended to March 10, upon the condition that the hearing be held in Los Angeles, California, on March 16, 1934. Reserving his right to object to the jurisdiction of the Secretary or to the validity of the Order to Show Cause, this condition was agreeable to counsel for respondent, and a voluminous answer, consisting of twenty-seven pages with attached exhibit, was filed within the time specified to the charges set forth in said Order to Show Cause, in accordance with General Regulations, Series 3. In said answer the respondent, after objecting and excepting to the jurisdiction of the Secretary of Agriculture to hear or determine the issues presented in this matter, denied each and all of the allegations contained in the Order to Show Cause and

alleged numerous specific grounds as matters of defense to the charges made in said order. This answer is contained in Government Exhibit No. 1 which was submitted for the record made at the hearing.

A hearing was held on March 16, 1934, at 10 o'clock A. M., in the Assembly Room of the California State Building, Los Angeles, California, in accordance with the order of the Secretary, and as agreed to by counsel for the respondent, before Arthur P. Curran, Esq., Presiding Officer, an officer and employee of the United States Department of Agriculture, duly designated and appointed by the Secretary. The respondent appeared and was represented by Attorney Lewis D. Collings, The Secretary of Agriculture was represented by C. P. Dorr, Esq., and A. D. Hadley, Esq., of Washington, D. C.

It was stipulated at the hearing by counsel for all parties that the above entitled case be consolidated with the cases of Valley Dairy Company, Western Holstein Farms, Inc., and Lucerne Cream and Butter Company for the purpose of the trial, and that in determination of each case, the testimony applicable to all four cases, as well as the testimony pertaining to that particular case, should be considered.

At the outset, counsel for respondent raised certain objections to the jurisdiction of the Secretary to try the issues raised by the Order to Show Cause and the answer, which objections were overruled. Various actions to dismiss the proceedings based on lack of jurisdiction were also offered by counsel for respondent. After extended argument by both counsel for respondent and

counsel for the Government, and upon consideration of the authorities submitted, the various actions to dismiss were denied. At said hearing, after objecting to the introduction of any and all of the testimony to be introduced by counsel for the Secretary, counsel for the respondent participated fully in the proceedings and cross-examined fully the witnesses produced on behalf of the Secretary.

After ten full days consumed in the taking of testimony, on April 12, 1934, by agreement of counsel representing all parties, the hearing was adjourned until such time as the audit being made of the Los Angeles Milk Industry Board and Milk Producers, Inc., by representatives of the Comptrolier of the Department of Agriculture, was completed. It was stipulated that the audit should be received in evidence at an adjourned hearing to be held in Washington in lieu of further cross-examination of Mr. Evans, Accountant, for the Milk Producers, Inc., and that this audit should be considered by the Secretary in arriving at his final determination with respect to the issues raised herein. However, it was further agreed that the respondents were to have the privilege to present such additional evidence as might come to their attention during the adjournment. Counsel for the respondents submitted to the auditors a statement of the various contentions for their consideration in completing the audit. The auditors considered these various contentions in making their audit and the audit was completed as agreed and copies furnished to the parties herein.

On May 31, 1934, the Secretary terminated License No. 17, License for Milk—Los Angeles Milk Shed, effective on and after 12:01 A. M., Eastern Standard Time, June 1, 1934. In said order of termination it was provided that "any and all obligations which have arisen, or which may hereafter arise in connection therewith, by virtue of, or pursuant to, such license, shall be deemed not to be affected, waived, or terminated hereby."

On May 31, 1934, the Secretary duly issued License No. 57, License for Milk—Los Angeles, California, Sales Area, effective June 1, 1934, and continuously since said date Charles J. Kurtz, doing business under the fictitious firm name of Golden West Creamery Company, has been engaged in the business of distributing, marketing, or handling milk or cream as a distributor in the Los Angeles Sales Area and is a licensee duly licensed under said License No. 57. In Paragraph 4, Section 7, Article II, of said License No. 57, it was provided that: "Each and every distributor shall fulfill any and all of his obligations which shall have arisen or which may hereafter arise in connection with, by virtue of, or pursuant to, the License for Milk in the Los Angeles Sales Area, issued by the Secretary on November 16, 1933."

Pursuant to notice duly served upon the respondents, and in accordance with the agreement entered into by the parties on April 12, 1934, the matter came on for further hearing on June 14, 1934, at Washington, D. C. Counsel for the respondents and counsel for the Government appeared at said adjourned hearing at the time and place specified in said notice. At the hearing, the audits, completed by the auditors of the Department of Agri-

culture, were introduced in evidence. After objecting to the introduction of the audits, which objections were overruled, counsel for the respondents examined Mr. Manley, under whose supervision the audits were made, with respect to various matters contained in the aforesaid audits.

On June 18, 1934, at the adjourned hearing, counsel for the Secretary moved to amend the Order to Show Cause, issued in the above entitled case, charging the respondent with failure to fulfill its obligations under the prior license No. 17, as provided for by Paragraph 4, Section 7, Article II of License No. 57, License for Milk,—Los Angeles, California, Sales Area, and in connection therewith offered for the record the order of the Secretary terminating License No. 17 and a certified copy of the new License No. 57. The order of the Secretary terminating License No. 17 was admitted in evidence without objection. Subject to respondent's objection, the Presiding Officer granted leave to counsel for the Government to amend the Order to Show Cause and received in evidence Government Exhibit No. 51 which was a certified copy of License No. 57. The amendment to the Order to Show Cause was presented by counsel for the Secretary and incorporated in the record. Thereupon, counsel for the respondent refused to participate further in the case and, waiving oral argument upon the record as thus made, asked permission to file a brief with respect to the propriety of the granting of the motion to amend said Order to Show Cause. The permission was granted and counsel for the respondent thereupon withdrew from the hearing.

The fullest opportunity to be heard and to produce evidence bearing upon the issues presented was afforded to the Secretary and to the respondent and both said parties were fully heard. At the close of the hearing neither counsel for the respondent nor for Government made any argument but were content to have the decision arrived at upon the record as made and brief filed therein. The hearing consumed twelve full days.

Thereafter the Presiding Officer made Findings of Fact and Recommendations and reported the same to the Secretary together with the record of the proceedings including the Order to Show Cause, Answer, stenographic report of all the oral testimony and all the documentary evidence offered and received, and a brief filed by the respondent with a transcript of all testimony and documentary evidence offered and received in the aforesaid four consolidated cases, and the briefs filed therein.

Upon the record thus made, the Secretary of Agriculture in addition to the foregoing, makes the following Specific Findings of Fact:

(1) That the respondent, Charles J. Kurtz, doing business under the fictitious firm name of Golden West Creamery Company, has his place of business at Moneta, California.

(2) That the respondent purchases fluid milk from producers in the Los Angeles Milk Shed and distributes said milk for consumption as fluid milk in the Los Angeles Sales Area.

(3) That the respondent, since the effective date of License No. 17 and prior thereto, including the period described in the license as the "production base period,"

has been engaged in distributing fluid milk for consumption in the Los Angeles Sales Area and was a licensee duly licensed under License No. 17 from the effective date of said License No. 17, November 20, 1933, until the termination of said license on May 31, 1934.

(4) That the respondent, since the effective date of License No. 57, has been and is in the business of distributing, marketing and handling milk and cream as a distributor in the Los Angeles Sales Area and is a licensee duly licensed under License No. 57.

(5) That in the marketing of fluid milk produced in the Los Angeles Milk Shed, and in the distribution of said fluid milk in the Los Angeles Sales Area, both interstate and intrastate commerce are so inextricably intermingled that said marketing and distribution of fluid milk in the Los Angeles Sales Area are in the current of interstate commerce. And further that intrastate commerce in such marketing and distribution of fluid milk in the Los Angeles Sales Area effects, burdens, and competes with interstate commerce in such marketing and distribution of fluid milk and of milk products in such a manner as to bring the distribution and marketing of fluid milk within said area in the current of interstate commerce and under the power of regulation vested in the Secretary of Agriculture by the Agricultural Adjustment Act, and the business of the respondent in the marketing and distribution of fluid milk within said area is such as to bring him within the said current of interstate commerce.

(6) That certain producers from whom the respondent purchased fluid milk did, at various times during the period covered by License No. 17, ship fluid milk to the surplus plant operated by Milk Producers, Inc., which is successor to Producers Arbitration Committee, Inc., as provided for in said License No. 17.

(7) That large quantities of the butter, cheese and other dairy products manufactured at the surplus plant operated by Milk Producers, Inc., which is successor to Producers Arbitration Committee, Inc., from milk delivered to said plant by producers within the said area, were shipped in interstate commerce.

(8) That the Los Angeles Milk Industry Board was duly organized in accordance with the terms of said License No. 17: that the said Board was composed of thirteen members who were properly selected in accordance with the provisions of Exhibit D of said license, all of which appointments to said Board were approved by the Secretary, as provided for in said license.

(9) That the said Los Angeles Milk Industry Board has functioned continuously since its creation in the performance of its duties, as set forth in said License No. 17.

(10) That the said Los Angeles Milk Industry Board, in accordance with the provisions of Exhibit D of the said License, made certain arrangements to determine under the provisions of Paragraph 9 of Exhibit C of said License No. 17 whether the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area had become so decreased as to render impractical in its opinion the accounting for such

variations through adjustments in the base price paid producers.

(11) That, pursuant to Paragraph 9 of Exhibit C of License No. 17, the Los Angeles Milk Industry Board determined that the daily average quantity of milk sold for consumption in the Los Angeles Sales Area had become so decreased as to render impractical the accounting for such variations through adjustments in the base price as provided for in Paragraph 4, Schedule "C," "Establishment of Adjusted Base Price."

(12) That, pursuant to Paragraph 9 of Exhibit C of License No. 17, Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., made certain uniform decreases for each month in all existing established bases of producers to the end that the sum total of all bases adjusted would again approximate in amount the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area.

(13) That the various percentages of scale downs in existing established bases of producers by said Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., for the respective periods were approved by the Los Angeles Milk Industry Board and by the Secretary, as provided by Paragraph 9 of Exhibit C of License No. 17—"Establishment of Adjusted Base Price."

(14) That the existing established base of each producer was determined by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., on the basis of deliveries of producers during the base period March

16, 1933, to June 15, 1933, both dates inclusive, ascertained from reports of distributors, which include producer-distributors, covering deliveries to them or milk produced by them for this period. The total deliveries of each producer divided by the number of days in the base period established the producer's general daily average base. This general daily average base was scaled down pursuant to Paragraph 9 of Exhibit C of License No. 17, to arrive at an adjusted basic average for each producer for the period. The resultant total was the quantity that the producer was to deliver or sell as base milk. Milk delivered or sold in excess of this monthly base was treated as surplus milk.

(15) That Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., was operating the surplus plant, as provided for in Exhibit C of said License, accounting to producers delivering milk to it for the full base price as set forth in said license in respect to deliveries not in excess of the individual producer's adjusted base as determined above, and for the surplus price in respect of deliveries in excess of producer's adjusted base.

(16) That the amounts determined by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., to be due and payable to it by distributors in the Los Angeles Sales Area, including the respondent, as surplus deductions, represented the difference between the base price and the surplus price for the various periods here under consideration as provided in said License No. 17 and were approved by the Los Angeles Milk Industry Board.

(17) That operating statements for the periods November 20, 1933, to November 30, 1933, December, 1933, January, 1934, and February, 1934, were prepared from the books and records of Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., which statements reflect the recorded transactions for the above named periods and reveal a loss attributable to the operation of the surplus plant for the periods above set forth.

(18) That the operating charges incurred by the surplus plant operated by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., were approved by the proper authorities and represent reasonable items of expense.

(19) That a charge of 1c per pound of butterfat was set up for the month of December, 1933, through adjustment of the base price for that period with respect to working capital and that the methods adopted by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., in arriving at the amounts to be charged to working capital were ratified and approved by the Los Angeles Milk Industry Board, as provided by Paragraphs 7 and 8 of Exhibits C—"Establishment of Adjusted Base Price," of said License No. 17.

(20) That the methods adopted by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., in arriving at surplus deductions were reasonable and were approved by the Los Angeles Milk Industry Board and by the Secretary.

(21) That a small quantity of Grade B milk was handled by the surplus plant; that in the handling of said

milk no loss was incurred and that the income from Grade B milk resulting from the sale of butter, powdered skim and other manufactured products arising therefrom more than offset the price paid for Grade B milk and the manufacture thereof.

(22) That the Los Angeles Milk Industry Board is audited monthly by Martin J. Masters, certified public accountant, Los Angeles, California, which audits indicate that the items of expense incurred by said Board were proper in effectuating the purposes and principles embodied in License No. 17.

(23) That said licensee, his employees and agents in the State of California at divers times since November 20, 1933, has violated Article III, Section 1 of said License under License No. 17 by purchasing fluid milk for distribution under terms and conditions other than those set forth in Exhibit A of said License.

(24) That the respondent failed to file, prior to the 5th day of each month, with the Chairman of the Los Angeles Milk Industry Board, a statement of the quantity of milk purchased from each producer, as provided for by Paragraph 4 (a) of Article III of said License.

(25) That, pursuant to Paragraph 4 (b) of said License, the Los Angeles Milk Industry Board made a determination that distributors be billed at the rate of ¼c per pound butterfat contained in the milk purchased by distributors and ¼c per pound butterfat for all milk distributed.

(26) That the respondent purchased fluid milk for distribution as Grade A market milk, from producers

without obtaining the authorization of such producers to pay over to the Los Angeles Milk Industry Board amounts of ¼c for each pound of butterfat contained in said milk purchased by the respondent, determined by said board to be payable to it, and failed and refused to pay over said amounts to said Board.

(27) That the respondent was billed monthly for the above amounts determined by the Los Angeles Milk Industry Board to be due under Paragraph 4 (b) of Article III of said License, and subsequently corrected billings with respect to the foregoing periods were sent to the respondent in respect of the amounts determined by the Los Angeles Milk Industry Board to be due under Paragraph 4 (b) of Article III of said License.

(28) That the respondent failed to pay over to the Los Angeles Milk Industry Board the amount of ¼c as a distributor, for each pound of butterfat contained in the milk distributed by said respondent, as provided by Paragraph 4 (b) of Article III of said License.

(29) That, pursuant to provisions of Paragraph (4) (c) of Article III of said license, the Los Angeles Milk Industry Board made a determination each month of the average amount of the deductions which the members of the associations therein named authorized the distributors to pay over to such associations in behalf of their respective members, for the purpose of determining an amount to be paid equal to said average by producers not members of the associations therein named to the Los Angeles Milk Industry Board; that said determinations were corrected in accordance with reports submitted to it by said associations.

(30) That the said respondent purchased milk for distribution as Grade A market milk from producers not members of the associations therein named without obtaining the authorization of such producers to pay over to the Los Angeles Milk Industry Board the amounts determined by the Los Angeles Milk Industry Board under Paragraph 4 (c) as due and payable to it.

(31) That the said respondent was billed monthly for the amounts determined to be due by the Los Angeles Milk Industry Board under Paragraph 4 (c) of Article III of said license; and later was furnished with corrected billings with respect to said amounts; that the respondent failed to pay over to the Los Angeles Milk Industry Board said corrected amounts so determined by said Board to be payable to it.

(32) That the respondent has failed to pay and has not paid to the Los Angeles Milk Industry Board the deductions required in accordance with the provisions of Paragraph 4 (b) and Paragraph 4 (c) of Article III of said License which payments were required to be made at the time for making payments to producers for milk purchased pursuant to Paragraph 4 (d) of said License No. 17.

(33) That the respondent purchased milk for distribution as Grade A market milk from the producers who were not members of the associations listed in Paragraph 4 of Article III of said license and that the respondent did not and has not secured the authorization of such producers to deduct as surplus deductions each month the amounts required to be deducted in accord-

ance with the provisions of Paragraph 5 (b) of Article III of said License.

(34) That the Los Angeles Milk Industry Board made a determination of the amounts due and payable to the Milk Producers, Inc., as surplus deductions.

(35) That the respondent was billed monthly for the amounts determined to be payable as surplus deductions to Milk Producers, Inc., as provided for by Paragraph 5 (b) of Article III of said license, and that, subsequently, corrected billings were sent to the respondent with respect to the amounts due and payable as surplus deductions to Milk Producers, Inc., successor to Producers Arbitration Committee, Inc.

(36) That the respondent failed to pay the sums estimated as surplus deductions to Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., for each month, as provided for by Paragraph 5 (b) of Article III and Exhibit C of said License.

(37) That the failure by the respondent to comply with each and all of the aforesaid provisions of License No. 17 constitutes a violation of the respective provisions of said License No 17 and also constitutes a violation of Paragraph 4, Section 7, Article II of License No. 57, License for Milk—Los Angeles, California, Sales Area.

CONCLUSION

Based upon the foregoing Findings of Fact I hereby determine and conclude that the facts and circumstances proved in this case establish and prove the charges Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 13 of the said Order to Show Cause and prove the violations by the respond-

ent of License No. 17, as charged therein, and therefore establish and prove violations by the respondent of Article II, Section 7, Paragraph 4 of License No. 57 as charged in the amendment to the Order to Show Cause.

I further determine that any one of said violations of License No. 17 so established and proved warrants independently the revocation of the license of the respondent under License No. 57.

ORDER

The Secretary of Agriculture hereby issues the following Order:

It Is Hereby Ordered that the License of Charles J. Kurtz, doing business under the fictitious firm name of Golden West Creamery Company under License No. 57, License for Milk, Los Angeles, California, Sales Area, be and it is hereby revoked.

It Is Further Ordered that this Order shall become effective on and after 6:00 P. M., Pacific Time on the 28th day of July, 1934.

It Is Further Ordered that a copy of this Order be served on Charles J. Kurtz, doing business under the fictitious firm name of Golden West Creamery Company, by depositing the same in the United States mail registered and addressed to Charles J. Kurtz, at his last known address, to wit: Moneta, California.

In Witness Whereof I have hereunto set my hand and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington, District of Columbia, this 28th day of July, 1934.

(Seal) (Signed) H. A. Wallace
Secretary of Agriculture.

EXHIBIT "E"

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
WASHINGTON, D. C.

I, James K. Knudson, Acting Chief Hearing Clerk of the United States Department of Agriculture, Agricultural Adjustment Administration, pursuant to General Regulations, Series 7 thereof, do hereby certify:

1. That there has been filed in the office of the said Chief Hearing Clerk, a certain document in connection with a hearing held pursuant to Section 8 (3) of the Agricultural Adjustment Act, relating to the revocation and suspension of a certain license, to-wit:

WESTERN HOLSTEIN FARMS, INC.
a California corporation Case No. 17-1-5

which said document is now on file in the office of the Chief Hearing Clerk, and is as follows: Findings of Fact and Order of the Secretary signed by the Secretary of Agriculture, H. A. Wallace, on this 28th day of July, 1934.

2. A true and correct copy of said document is attached hereto.

WITNESS my hand and official seal this 28th day of July, A. D., 1934.

SEAL

James K. Knudson,
Acting Chief Hearing Clerk
United States Department of Agriculture
Agricultural Adjustment Administration

(SIGNED) JOSEPH A. WALSH
Deputy Hearing Clerk

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
WASHINGTON, D. C.

IN THE MATTER OF
WESTERN HOLSTEIN FARMS, INC.,
a California corporation

Before the
Secretary of
Agriculture
Case No. 17-1-5

FINDINGS OF FACT AND ORDER OF THE SECRETARY.

On November 16, 1933, the Secretary of Agriculture duly issued License No. 17, License for Milk—Los Angeles Milk Shed, effective November 20, 1933, and continuously since said date Western Holstein Farms, Inc., a California corporation, has been a distributor of fluid milk for consumption in the Los Angeles Sales Area and was a licensee under said License No. 17 from the effective date of said License No. 17 until the termination of said License No. 17 on May 31, 1934.

On February 21, 1934, a written order of the Secretary, as provided for in General Regulations, Series 3, Sections 200 and 201, requiring respondent to show cause on or before the 5th day of March, 1934, why its License No. 17 should not be revoked or suspended by the Secretary, was duly served upon the respondent.

The said Order to Show Cause contained the following statements of the alleged violations of the terms and conditions of the license by the respondent:

"(1) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated the terms and conditions of said license.

"(2) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 1 of said license, by purchasing fluid milk for distribution as fluid milk in the Los Angeles Sales Area at prices and under terms and conditions different from those provided for in said paragraph and as set forth in Exhibit 'A' of the license.

"(3) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 3 of the license, in that it has purchased and distributed fluid milk in violation of the terms and conditions as set forth in the Production and Surplus Control Plan provided for in Exhibit 'C' of the license.

"(4) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (a) of the license, by failing and refusing to file reports and statements with the Chairman of the Los Angeles Milk Industry Board, as provided for in said paragraph of the license.

"(5) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (b) of said license, by purchasing milk from producers for distribution as Grade A Market Milk in violation of the terms and conditions of said paragraph.

"(6) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (b) of said license, by purchasing milk from producers for distribution as Grade A Market Milk in violation of the terms and con-

ditions of said paragraph, in that it has purchased fluid milk for consumption in the Los Angeles Sales Area from producers without being authorized by said producers to make the deductions as provided for in said paragraph of the license, and without making said deductions.

"(7) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (b) of said license, by failing and refusing to pay to the Los Angeles Milk Industry Board the amounts deducted from such producers, as provided for in said paragraph of the license.

"(8) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (b) of said license, by failing and refusing to pay as a distributor to the Los Angeles Milk Industry Board the amounts therein required to be paid by said licensee as a distributor.

"(9) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (b) of said license, by failing and refusing to deduct and pay over to the Los Angeles Milk Industry Board the amounts therein provided to be deducted and paid over for each pound of butter fat contained in milk produced by said licensee.

"(10) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (c) of said license, by purchasing milk for distribution as Grade A Market Milk from producers in violation of the terms and conditions of said paragraph of the license.

"(11) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (c) of said license, by purchasing milk for distribution as Grade A Market Milk from producers in violation of the terms and conditions of said paragraph of the license, and by failing and refusing to make the payments to the Los Angeles Milk Industry Board required by said paragraph of said license.

"(12) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (d) of said license, by failing and refusing to comply with the terms and conditions of said paragraph of said license.

"(13) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 5 (a) of said license, by failing and refusing to comply with the terms and conditions of its license as set forth in said paragraph.

"(14) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 5 (b) of said license, by failing and refusing to comply with the terms and conditions of its license as set forth in said paragraph.

"(15) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 5 (a) and (b) of said license, by purchasing milk for distribution as Grade "A" Market Milk in the Los Angeles Sales Area from producers who are not members of any of the associations of producers listed in Paragraph 4 of Article III of said

license without authorization from such producers to deduct, or cause to be deducted by the particular association of producers, if any, of which any such producer is a member, each month, certain sums therein required to be deducted and paid to Producers Arbitration Committee, Inc., or to its successor, Milk Producers, Inc., and without paying said sums to Milk Producers, Inc.

"(16) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 5 (c) of said license, by failing and refusing to comply with the terms and conditions of its license as set forth in said paragraph.

"(17) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 5 (c) of said license, by failing and refusing to pay each month to Producers Arbitration Committee, Inc., or its successor, Milk Producers, Inc., certain sums therein required to be paid, based upon the said licensee's production of milk for distribution by said licensee as Grade "A" Market Milk in the Los Angeles Sales Area.

"(18) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 14 of said license, by failing and refusing to comply with the terms and conditions of its license as set forth in said paragraph."

In response to a telegraphic request by counsel for respondent in the above entitled case, the time for filing its answer to said Order was extended to March 10, 1934, upon the condition that the hearing be held in Los Angeles, California, on March 16, 1934. Reserving

its right to object to the jurisdiction of the Secretary or to the validity of the Order to Show Cause, this condition was agreeable to counsel for respondent, and a voluminous Answer, consisting of twenty-six pages with an attached exhibit, was filed within the time specified to the charges set forth in said Order to Show Cause, in accordance with General Regulations, Series 3. In said Answer the respondent, after objecting and excepting to the jurisdiction of the Secretary of Agriculture to hear or determine the issues presented in this matter, denied each and all of the allegations contained in the Order to Show Cause and alleged numerous specific grounds as matters of defense to the charges made in said order. This Answer is contained in Government Exhibit No. 1 which was submitted for the record made at the hearing.

A hearing was held on March 16, 1934, at 10 o'clock A. M., in the Assembly Room of the California State Building, Los Angeles, California, in accordance with the order of the Secretary, and as agreed to by counsel for the respondent, before Arthur P. Curran, Esq., Presiding Officer, an officer and employee of the United States Department of Agriculture, duly designated and appointed by the Secretary. The respondent appeared and was represented by attorney, Lewis D. Collings. The Secretary of Agriculture was represented by C. P. Dorr, Esq., and A. D. Hadley, Esq., of Washington, D. C.

It was stipulated at the hearing by counsel for all parties that the above entitled case be consolidated with the cases of Charles J. Kurtz, doing business under the

fictitious firm name of Golden West Creamery Company, Valley Dairy Company, and Lucerne Cream and Butter Company, for the purpose of the trial, and that in determination of each case, the testimony applicable to all four cases, as well as the testimony pertaining to that particular case, should be considered.

At the outset, counsel for respondent raised certain objections to the jurisdiction of the Secretary to try the issues raised by the Order to Show Cause and the Answer, which objections were overruled. Various motions to dismiss the proceedings based on lack of jurisdiction were also offered by counsel for respondent. After extended argument by both counsel for respondent and counsel for the Government, and upon consideration of the authorities submitted, the various motions to dismiss were denied. At said hearing, after objecting to the introduction of any and all of the testimony to be introduced by counsel for the Secretary, counsel for the respondent participated fully in the proceedings and cross-examined fully the witnesses produced on behalf of the Secretary.

After ten full days consumed in the taking of testimony, on April 12, 1934, by agreement of counsel representing all parties, the hearing was adjourned until such time as the audit being made of the Los Angeles Milk Industry Board and Milk Producers, Inc., by representatives of the comptroller of the Department of Agriculture, was completed. It was stipulated that the audit should be received in evidence at an adjourned hearing to be held in Washington in lieu of further cross-examination of Mr. Evans, Accountant for the Milk Pro-

ducers, Inc., and that this audit should be considered by the Secretary in arriving at his final determinations with respect to the issues raised herein. However, it was further agreed that the respondents were to have the privilege to present such additional evidence as might come to their attention during the adjournment. Counsel for the respondents submitted to the auditors a statement of the various contentions for their consideration in completing the audit. The auditors considered these various contentions in making their audit and the audit was completed as agreed and copies furnished to the parties herein.

On May 31, 1934, the Secretary terminated License No. 17, License for Milk—Los Angeles Milk Shed, effective on and after 12:01 A. M., Eastern Standard Time, June 1, 1934. In said order of termination it was provided that "any and all obligations which have arisen, or which may hereafter arise in connection therewith, by virtue of, or pursuant to, such license, shall be deemed not to be effected, waived, or terminated hereby."

On May 31, 1934, the Secretary duly issued License No. 57, License for Milk—Los Angeles, California, Sales Area, effective June 1, 1934, and continuously since said date the Western Holstein Farms, Inc., a California corporation, has been engaged in the business of distributing, marketing, or handling milk or cream as a distributor in the Los Angeles Sales Area and is a licensee duly licensed under said License No. 57. In Paragraph 4, Section 7, Article II, of said License No. 57 it was provided that: "Each and every distributor shall fulfill any and all of his obligations which

shall have arisen or which may hereafter arise in connection with, by virtue of, or pursuant to, the License for Milk in the Los Angeles Sales Area issued by the Secretary on November 16, 1933."

Pursuant to notice duly served upon the respondents, and in accordance with the agreement entered into by the parties on April 12, 1934, the matter came on for further hearing on June 14, 1934, at Washington, D. C. Counsel for the respondents and counsel for the Government appeared at said adjourned hearing at the time and place specified in said notice. At the hearing, the audits, completed by the auditors of the Department of Agriculture, were introduced in evidence. After objecting to the introduction of the audits, which objections were overruled, counsel for the respondents examined Mr. Manley, under whose supervision the audits were made, with respect to various matters contained in the aforesaid audits.

On June 18, 1934, at the adjourned hearing, counsel for the Secretary moved to amend the Order to Show Cause, issued in the above entitled case, charging the respondent with failure to fulfill its obligations under the prior License No. 17, as provided for by Paragraph 4, Section 7, Article II of License No. 57, License for Milk —Los Angeles, California, Sales Area, and in connection therewith offered for the record the order of the Secretary terminating License No. 17 and a certified copy of the new License No. 57. The order of the Secretary terminating License No. 17 was admitted in evidence without objection. Subject to respondent's objection, the Presiding Officer granted leave to counsel

for the Government to amend the Order to Show Cause and received in evidence Government Exhibit No. 51 which was a certified copy of License No. 57. The amendment to the Order to Show Cause was presented by counsel for the Secretary and incorporated in the record. Thereupon, counsel for the respondent refused to participate further in the case and, waiving oral argument upon the record as thus made, asked permission to file a brief with respect to the propriety of the granting of the motion to amend said Order to Show Cause. The permission was granted and counsel for the respondent thereupon withdrew from the hearing.

The fullest opportunity to be heard and to produce evidence bearing upon the issues presented was afforded to the Secretary and to the respondent and both said parties were fully heard. At the close of the hearing neither counsel for the respondent nor for the Government made any argument but were content to have the decision arrived at upon the record as made and brief filed therein. The hearing consumed twelve full days.

Thereafter the Presiding Officer made Findings of Fact and Recommendations and reported the same to the Secretary together with the record of the proceedings, including the Order to Show Cause, Answer, stenographic report of all the oral testimony and all the documentary evidence offered and received, and a brief filed by the respondent, with a transcript of all testimony and documentary evidence offered and received in the aforesaid four consolidated cases, and the briefs filed therein.

Upon the record thus made, the Secretary of Agriculture, in addition to the foregoing, makes the following Specific Findings of Fact:

(1) That the respondent, Western Holstein Farms, Inc., is a California corporation whose address is 3402 South Avalon Boulevard, Los Angeles, California.

(2) That the respondent purchases fluid milk from producers in the Los Angeles Milk Shed and distributes said milk for consumption in the Los Angeles Sales Area and also has a production of its own of milk produced in the Los Angeles Milk Shed which it distributes for consumption as fluid milk in the Los Angeles Sales Area.

(3) That the respondent, since the effective date of License No. 17 and prior thereto, including the period described in the License as the "production base period," has been engaged in distributing fluid milk for consumption in the Los Angeles Sales Area and was a licensee duly licensed under License No. 17 from the effective date of said License No. 17, November 20, 1933, until the termination of said License on May 31, 1934.

(4) That the respondent, since the effective date of License No. 57, has been and is in the business of distributing, marketing and handling milk and cream as a distributor in the Los Angeles Sales Area and is a licensee duly licensed under License No. 57.

(5) That in the marketing of fluid milk produced in the Los Angeles Milk Shed and in the distribution of said fluid milk in the Los Angeles Sales Area, both interstate and intrastate commerce are so inextricably intermingled that said marketing and distribution of fluid milk in the Los Angeles Sales Area are in the current of interstate commerce. And further that intrastate commerce in such marketing and distribution of fluid milk in the Los Angeles Sales Area effects, burdens, and competes with

interstate commerce in such marketing and distribution of fluid milk and of milk products in such a manner as to bring the distribution and marketing of fluid milk within said area in the current of interstate commerce and under the power of regulation vested in the Secretary of Agriculture by the Agricultural Adjustment Act, and the business of the respondent in the marketing and distribution of fluid milk within said area is such as to bring it within the said current of interstate commerce.

(6) That large quantities of the butter, cheese and other dairy products manufactured at the surplus plant operated by Milk Producers, Inc., which is successor to Producers Arbitration Committee, Inc., from milk delivered to said plant by producers within the said area, were shipped in interstate commerce.

(7) That the Los Angeles Milk Industry Board was duly organized in accordance with the terms of said License No. 17; that the said Board was composed of thirteen members who were properly selected in accordance with the provisions of Exhibit D of said License, all of which appointments to said Board were approved by the Secretary, as provided for in said License.

(8) That the said Los Angeles Milk Industry Board has functioned continuously since its creation in the performance of its duties, as set forth in said License No. 17.

(9) That the said Los Angeles Milk Industry Board, in accordance with the provisions of Exhibit D of the said License, made certain arrangements to determine under the provisions of Paragraph 9 of Exhibit C of said License No. 17 whether the daily average quantity

of milk sold for consumption as whole milk in the Los Angeles Sales Area had become so decreased as to render impractical in its opinion the accounting for such variations through adjustments in the base price paid producers.

(10) That pursuant to Paragraph 9 of Exhibit C of License No. 17, the Los Angeles Milk Industry Board determined that the daily average quantity of milk sold for consumption in the Los Angeles Sales Area had become so decreased as to render impractical the accounting for such variations through adjustments in the base price as provided for in Paragraph 4, Schedule "C," "Establishment of Adjudged Base Price."

(11) That pursuant to Paragraph 9 of Exhibit C of License No. 17, Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., made certain uniform decreases for each month in all existing established bases of producers to the end that the sum total of all bases adjusted would again approximate in amount the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area.

(12) That the various percentages of scale downs in existing established bases of producers by said Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., for the respective periods were approved by the Los Angeles Milk Industry Board and by the Secretary, as provided by Paragraph 9 of Exhibit C of License No. 17—"Establishment of Adjusted Base Price."

(13) That the existing established base of each producer was determined by Milk Producers, Inc., successor

to Producers Arbitration Committee, Inc., on the basis of deliveries of producers during the base period March 16, 1933 to June 15, 1933, both dates inclusive, ascertained from reports of distributors, which include producer-distributors, covering deliveries to them or milk produced by them for this period. The total deliveries of each producer divided by the number of days in the base period established the producer's general daily average base. This general daily average base was scaled down, pursuant to Paragraph 9 of Exhibit C of License No. 17, to arrive at an adjusted basic average for each producer for the period. The resultant total was the quantity that the producer was to deliver or sell as base milk. Milk delivered or sold in excess of this monthly base was treated as surplus milk.

(14) That Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., was operating the surplus plant, as provided for in Exhibit C of said License, accounting to producers delivering milk to it for the full base price as set forth in said License in respect of deliveries not in excess of the individual producer's adjusted base as determined above, and for the surplus price in respect of deliveries in excess of producer's adjusted base.

(15) That the amounts determined by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., to be due and payable to it by distributors in the Los Angeles Sales Area, including the respondent, as surplus deductions, represented the difference between the base price and the surplus price for the various periods here under consideration as provided in said

License No. 17, and were approved by the Los Angeles Milk Industry Board.

(16) That operating statements for the periods November 20, 1933, to November 30, 1933, December, 1933, January, 1934, and February, 1934, were prepared from the books and records of Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., which statements reflect the recorded transactions for the above named periods and reveal a loss attributable to the operation of the surplus plant for the periods above set forth.

(17) That the operating charges incurred by the surplus plant operated by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., were approved by the proper authorities and represent reasonable items of expense.

(18) That a charge of 1c per pound of butterfat was set up for the month of December, 1933, through adjustment of the base price for that period with respect to working capital and that the methods adopted by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., in arriving at the amounts to be charged to working capital were ratified and approved by the Los Angeles Milk Industry Board, as provided by Paragraphs 7 and 8 of Exhibit C—"Establishment of Adjusted Base Price", of said License No. 17.

(19) That the methods adopted by Milk Producers, Inc., successors to Producers Arbitration Committee, Inc., in arriving at surplus deductions were reasonable and were approved by the Los Angeles Milk Industry Board and by the Secretary.

(20) That a small quantity of Grade B Milk was handled by the surplus plant; that in the handling of said milk no loss was incurred and that the income from Grade B milk resulting from the sale of butter, powdered skim and other manufactured products arising therefrom more than offset the price paid for Grade B milk and the manufacture thereof.

(21) That the Los Angeles Milk Industry Board is audited monthly by Martin J. Masters, certified public accountant, Los Angeles, California, which audits indicate that the items of expense incurred by said Board were proper in effectuating the purposes and principles embodied in License No. 17.

(22) That said licensee, its officers, employees and agents in the State of California at divers times since November 20, 1933, has violated Article III, Section 1 of said License under License No. 17 by purchasing fluid milk for distribution under terms and conditions other than those set forth in Exhibit A of said License.

(23) That the respondent failed to file, prior to the 5th day of each month, with the Chairman of the Los Angeles Milk Industry Board, a statement of (a) the quantity of milk purchased from each producer, and (b) the quantity produced and sold as fluid milk, as provided for by Paragraph 4 (a) of Article III of said License.

(24) That, pursuant to Paragraph 4 (b) of said License, the Los Angeles Milk Industry Board made a determination that distributors be billed at the rate of ¼c per pound butterfat contained in the milk pur-

chased by distributors and ¼c per pound butterfat for all milk distributed.

(25) That the respondent purchased fluid milk, for distribution as Grade A market milk, from producers without obtaining the authorization of such producers to pay over to the Los Angeles Milk Industry Board amounts of ¼c for each pound of butterfat contained in said milk purchased by the respondent, determined by said Board to be payable to it, and failed and refused to pay over to said Board said amount and also an additional amount of ¼c for each pound of butterfat contained in milk produced by it.

(26) That the respondent was billed monthly for the above amounts determined by the Los Angeles Milk Industry Board to be due under Paragraph 4 (b) of Article III of said License ,and subsequently corrected billings with respect to the foregoing periods were sent to the respondent in respect of the amounts determined by the Los Angeles Milk Industry Board to be due under Paragraph 4 (b) of Article III of said License.

(27) That the respondent failed to pay over to the Los Angeles Milk Industry Board the amount of ¼c, as a distributor, for each pound of butterfat contained in the milk distributed by said respondent, as provided by Paragraph 4 (b) of Article III of said License.

(28) That, pursuant to provisions of Paragraph 4 (c) of Article III of said License, the Los Angeles Milk Industry Board made a determination each month of the average amount of the deduction which the members of the association therein named authorized the distributors to pay over to such associations in behalf

of their respective members, for the purpose of determining an amount to be paid equal to said average by producers not members of the associations therein named to the Los Angeles Milk Industry Board; that said determinations were corrected in accordance with reports submitted to it by said associations.

(29) That the said respondent purchased milk for distribution as Grade A Market milk from producers not members of the associations therein named without obtaining the authorization of such producers to pay over to the Los Angeles Milk Industry Board the amounts determined by the Los Angeles Milk Industry Board under Paragraph 4 (c) as due and payable to it.

(30) That the said respondent was billed monthly for the amounts determined to be due by the Los Angeles Milk Industry Board under Paragraph 4 (c) of Article III of said License; and later was furnished with corrected billings with respect to said amounts: that the respondent failed to pay over to the Los Angeles Milk Industry Board said corrected amounts so determined by said Board to be payable to it.

(31) That the respondent has failed to pay and has not paid to the Los Angeles Milk Industry Board the deductions required in accordance with the provisions of Paragraph 4 (b) and Paragraph 4 (c) of Article III of said License, which payments were required to be made at the time for making payments to producers for milk purchased, pursuant to Paragraph 4 (d) of said License No. 17.

(32) That the respondent purchased milk for distribution as Grade A Market Milk from the producers who

were not members of the associations listed in Paragraph 4 of Article III of said License and that the respondent did not and has not secured the authorization of such producers to deduct as surplus deductions each month the amounts required to be deducted in accordance with the provisions of Paragraph 5 (b) of Article III of said License.

(33) That the Los Angeles Milk Industry Board made a determination of the amounts due and payable to Milk Producers, Inc., as surplus deductions.

(34) That the respondent was billed monthly for the amounts determined to be payable as surplus deductions to Milk Producers, Inc., as provided for by Paragraph 5 (b) and Paragraph 5 (c) of Article III of said License, and that subsequently corrected billings were sent to the respondent with respect to the amounts due and payable as surplus deductions to Milk Producers, Inc., successors to Producers Arbitration Committee, Inc.

(35) That the respondent failed to pay the sums estimated as surplus deductions to Milk Producers, Inc., successors to Producers Arbitration Committee, Inc., for each month, as provided for by Paragraph 5 (b) and Paragraph 5 (c) of Article III and Exhibit C of said License.

(36) That the failure by the respondent to comply with each and all of the aforesaid provisions of License No. 17 constitutes a violation of the respective provisions of said License No. 17 and also constitutes a violation of Paragraph 4, Section 7, Article II of License No. 57, License for Milk—Los Angeles, California, Sales Area.

CONCLUSION

Based upon the foregoing Findings of Fact I hereby determine and conclude that the facts and circumstances proved in this case establish and prove the charges Nos. (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (14), (16) and (17), of the said Order to Show Cause, and prove the violations by the respondent of License No. 17, as charged herein, and, therefore, establish and prove violation by the respondent of Article II, Section 7, Paragraph 4 of License No. 57, as charged in the amendment to the Order to Show Cause.

I further determine that any one of said violations so established and proved warrants independently the revocation of the license of the respondent under License No. 57.

ORDER

The Secretary of Agriculture hereby issues the following Order:

It Is Hereby Ordered that the License of Western Holstein Farms, Inc., a California corporation, under License No. 57, License for Milk—Los Angeles, California, Sales Area, be and it is hereby revoked.

It Is Further Ordered that this Order shall become effective on and after 6:00 P. M. Pacific Time, on the 28 day of July, 1934.

It Is Further Ordered that a copy of this order be served on Western Holstein Farms, Inc., a California corporation, by depositing the same in the United States mail registered and addressed to Western Holstein Farms., Inc., at its last known address, to-wit: 3402 South Avalon Boulevard, Los Angeles, California.

In Witness Whereof, I have hereunto set my hand and caused the official seal of the United States Department of Agriculture to be affixed in the City of Washington, D. C. this 28th day of July, 1934.

(Signed) H. A. Wallace,
(Seal) Secretary of Agriculture.

EXHIBIT "F"

United States Department of Agriculture
Agricultural Adjustment Administration
Washington, D. C.

I, James K. Knudson, Acting Chief Hearing Clerk of the United States Department of Agriculture, Agricultural Adjustment Administration, pursuant to General Regulations, Series 7 thereof, do hereby certify:

1. That there has been filed in the office of the said Chief Hearing Clerk, a certain document in connection with a hearing held pursuant to Section 8 (3) of the Agricultural Adjustment Act, relating to the revocation and suspension of a certain license, to-wit:

VALLEY DAIRY CO., INC.,
A California Corporation. Case No. 17-1-7

which said document is now on file in the office of the Chief Hearing Clerk, and is as follows: Findings of Fact and Order of the Secretary signed by the Secretary of Agriculture, H. A. Wallace, on this 28th day of July, 1934.

2. A true and correct copy of said document is attached hereto.

WITNESS my hand and official seal this 28th day of July, A. D., 1934.

James K. Knudson,
Acting Chief Hearing Clerk
(SEAL) United States Department of Agriculture
Agricultural Adjustment Administration
(SIGNED) JOSEPH A. WALSH
Deputy Hearing Clerk

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
WASHINGTON, D. C.

IN THE MATTER OF	Before the
VALLEY DAIRY CO., INC.,	Secretary of
A California Corporation	Agriculture
	Case No. 17-1-7

FINDINGS OF FACT AND ORDER OF THE SECRETARY

On November 16, 1933, the Secretary duly issued License No. 17, License for Milk—Los Angeles Milk Shed, effective November 20, 1933, and continuously since said date Valley Dairy Co., Inc., a California corporation, has been a distributor of fluid milk for consumption in the Los Angeles Sales Area and was a licensee under said License No. 17 from the effective date of said License No. 17 until the termination of said License No. 17 on May 31, 1934.

On February 21, 1934, a written order of the Secretary, as provided for in General Regulations, Series 3, Sections 200 and 201, requiring respondent to show cause on or before the 5th day of March, 1934, why its said

license under License No. 17 should not be revoked or suspended by the Secretary, was duly served upon the respondent.

The said Order to Show Cause contained the following statements of the alleged violations of the terms and conditions of the license by the respondent:

(1) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated the terms and conditions of said license.

(2) That said licensee, its officers, employees and agents, has at divers times since November 20, 1933, violated Article III, paragraph 1 of said license, by purchasing fluid milk for distribution as fluid milk in the Los Angeles Sales Area at prices and under terms and conditions different from those provided for in said paragraph and as set forth in Exhibit "A" of the license.

(3) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 3 of said license, in that it has purchased and distributed fluid milk in violation of the terms and conditions as set forth in the Production and Surplus Control Plan as provided for in Exhibit "C" of the license.

(4) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (b) of said license by purchasing milk from producers for distribution as Grade A Market Milk in violation of the terms and conditions of said paragraph of the license.

(5) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has

violated Article III, paragraph 4 (b) of said license by purchasing milk from producers for distribution as Grade A Market Milk in violation of the terms and conditions of said paragraph, in that it has purchased fluid milk for consumption in the Los Angeles Sales Area from producers without being authorized by said producers to make the deductions as provided for in said paragraph of the license, and without making said deductions.

(6) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (b) of said license, by failing and refusing to pay to the Los Angeles Milk Industry Board the amounts deducted from producers, as provided for in said paragraph of the license.

(7) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (b) of said license, by failing and refusing to pay, as a distributor, to the Los Angeles Milk Industry Board the amounts therein required to be paid by it as a distributor.

(8) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (b) of said license, by failing and refusing to deduct and pay over to the Los Angeles Milk Industry Board the amounts therein provided to be deducted and paid over for each pound of butterfat contained in milk produced by said licensee.

(9) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (c) of said license,

by purchasing milk for distribution as Grade A Market Milk from producers in violation of the terms and conditions of said paragraph of the license.

(10) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 4 (c) of said license, by purchasing milk for distribution as Grade A Market Milk from producers in violation of the terms and conditions of said paragraph of the license, and by failing and refusing to make the payments to the Los Angeles Milk Industry Board required by said paragraph of said license.

(11) That said licensee, its officers, employees and agents at divers times since November 20, 1933, has violated Article III, paragraph 4 (d) of said license, by failing and refusing to comply with the terms and conditions of said paragraph of said license.

(12) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 5 (a) of said license, by failing and refusing to comply with the terms and conditions of its license as set forth in said paragraph.

(13) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 5 (b) of said license, by failing and refusing to comply with the terms and conditions of its license as set forth in said paragraph.

(14) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 5 (a) and (b) of said license, by purchasing milk for distribution as Grade A Market

Milk in the Los Angeles Sales Area from producers who are not members of any of the associations of producers listed in paragraph 4 of Article III of said license without authorization from such producers to deduct, or cause to be deducted by the particular association of producers, if any, of which any such producer is a member, each month, certain sums therein required to be deducted and paid to Producers Arbitration Committee, Inc., or to its successor, Milk Producers, Inc., and without paying said sums to Milk Producers, Inc.

(15) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 5 (c) of said license, by failing and refusing to comply with the terms and conditions of its license as set forth in said paragraph.

(16) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 5 (c) of said license, by failing and refusing to pay each month to Producers Arbitration Committee, Inc., or its successor, Milk Producers, Inc., certain sums therein required to be paid, based upon said licensee's production of milk for distribution by said licensee as Grade A Market Milk in the Los Angeles Sales Area.

(17) That said licensee, its officers, employees and agents, at divers times since November 20, 1933, has violated Article III, paragraph 14 of said license, by failing and refusing to comply with the terms and conditions of its license as set forth in said paragraph.

In response to a telegraphic request by counsel for respondent in the above entitled case, the time for filing its

answer to said Order was extended to March 10, upon the condition that the hearing be held in Los Angeles, California, on March 16, 1934. Reserving its right to object to the jurisdiction of the Secretary or to the validity of the Order to Show Cause, this condition was agreeable to counsel for respondent, and an Answer, consisting of eighteen pages, was filed within the time specified to the charges set forth in said Order to Show Cause, in accordance with General Regulations, Series 3. In said Answer the respondent, after objecting and excepting to the jurisdiction of the Secretary of Agriculture to hear or determine the issues presented in this matter, denied each and all of the allegations contained in the Order to Show Cause and alleged numerous specific grounds as matters of defense to the charges made in said order. This Answer is contained in Government Exhibit No. 1 which was submitted for the record made at the hearing.

A hearing was held on March 16, 1934, at 10 o'clock A. M., in the Assembly Room of the California State Building, Los Angeles, California, in accordance with the order of the Secretary, and as agreed to by counsel for the respondent before Arthur P. Curran, Esq., Presiding Officer, an officer and employee of the United States Department of Agriculture, duly designated and appointed by the Secretary. The respondent appeared and was represented by attorney J. H. Johnston. The Secretary of Agriculture was represented by C. P. Dorr, Esq., and A. D. Hadley, Esq. of Washington, D. C.

It was stipulated at the hearing by counsel for all parties that the above entitled case be consolidated with the

cases of Charles J. Kurtz, Lucerne Cream and Butter Company, and Western Holstein Farms, Inc., for the purpose of the trial, and that in determination of each case, the testimony applicable to all four cases, as well as the testimony pertaining to that particular case, should be considered.

At the outset, counsel for respondent raised certain objections to the jurisdiction of the Secretary to try the issues raised by the Order to Show Cause and the answer, which objections were overruled. Various motions to dismiss the proceedings based on lack of jurisdiction were also offered by counsel for respondent. After extended argument by both counsel for respondent and counsel for the Government, and upon consideration of the authorities submitted, the various motions to dismiss were denied. At said hearing, after objecting to the introduction of any and all of the testimony to be introduced by counsel for the Secretary, counsel for the respondent participated fully in the proceedings and cross examined fully the witnesses produced on behalf of the Secretary.

After ten full days consumed in the taking of testimony, on April 12, 1934, by agreement of counsel representing all parties, the hearing was adjourned until such time as the audit being made of the Los Angeles Milk Industry Board and Milk Producers, Inc., by representatives of the Comptroller of the Department of Agriculture, was completed. It was stipulated that the audit should be received in evidence at an adjourned hearing to be held in Washington in lieu of further cross-examination of Mr. Evans, Accountant for the

Milk Producers, Inc., and that this audit should be considered by the Secretary in arriving at his final determinations with respect to the issues raised herein. However, it was further agreed that the respondents were to have the privilege of presenting such additional evidence as might come to their attention during the adjournment. Counsel for the respondents submitted to the auditors a statement of the various contentions for their consideration in completing the audit. The auditors considered these various contentions in making their audit and the audit was completed as agreed and copies furnished to the parties herein.

On May 31, 1934, the Secretary terminated License No. 17, License for Milk—Los Angeles Milk Shed, effective on and after 12:01 A. M., Eastern Standard Time, June 1, 1934. In said order of termination it was provided that "any and all obligations which have arisen, or which may hereafter arise in connection therewith, by virtue of or pursuant to, such license, shall be deemed not to be affected, waived, or terminated hereby."

On May 31, 1934, the Secretary duly issued License No. 57, License for Milk—Los Angeles, California, Sales Area, effective June 1, 1934, and continuously since said date the Lucerne Cream and Butter Company, a California corporation, has been engaged in the business of distributing, marketing or handling milk or cream as a distributor in the Los Angeles Sales Area and is a licensee duly licensed under said License No. 57. In Paragraph 4, Section 7, Article II of said License No. 57 it was provided that: "Each and every distributor shall fulfill any and all of his obligations which shall

have arisen or which may hereafter arise in connection with, by virtue of or pursuant to the License for milk in the Los Angeles Sales Area issued by the Secretary on November 16, 1933."

Pursuant to notice duly served upon the respondents, and in accordance with the agreement entered into by the parties on April 12, 1934, the matter came on for further hearing on June 14, 1934, at Washington, D. C. Counsel for the respondents and counsel for the Government appeared at said adjourned hearing at the time and place specified in said notice. At the hearing, the audits, completed by the auditors of the Department of Agriculture, were introduced in evidence. After objecting to the introduction of the audits, which objections were overruled, counsel for the respondents examined Mr. Manley, under whose supervision the audits were made, with respect to various matters contained in the aforesaid audits.

On June 18, 1934, at the adjourned hearing, counsel for the Secretary moved to amend the Order to Show Cause, issued in the above entitled case, charging the respondent with failure to fulfill its obligations under the prior License No. 17, as provided for by Paragraph 4, Section 7, Article II of License No. 57, License for Milk—Los Angeles, California, Sales Area, and in connection therewith offered for the record the order of the Secretary terminating License No. 17 and a certified copy of the new License No. 57. The order of the Secretary terminating License No. 17 was admitted in evidence without objection. Subject to respondent's objection, the Presiding Officer granted leave to counsel for

the Government to amend the Order to Show Cause and received in evidence Government Exhibit No. 51 which was a certified copy of License No. 57. The amendment to the Order to Show Cause was presented by counsel for the Secretary and incorporated in the record. Thereupon, counsel for the respondent refused to participate further in the case and, waiving oral argument upon the record as thus made, asked permission to file a brief with respect to the propriety of the granting of the motion to amend said Order to Show Cause. The permission was granted and counsel for the respondent thereupon withdrew from the hearing.

The fullest opportunity to be heard and to produce evidence bearing upon the issues presented was afforded to the Secretary and to the respondent and both said parties were fully heard. At the close of the hearing neither counsel for the respondent nor for Government made any argument but were content to have the decision arrived at upon the record as made and brief filed therein. The hearing consumed twelve full days.

Thereafter the Presiding Officer made Findings of Fact and a Recommendation and reported the same to the Secretary together with the record of the proceedings including the Order to Show Cause. Answer, stenographic report of all the oral testimony and all the documentary evidence offered and received, and a brief filed by the respondent with a transcript of all testimony and documentary evidence offered and received in the aforesaid four consolidated cases, and the briefs filed therein.

Upon the record thus made, the Secretary of Agriculture in addition to the foregoing, makes the following Specific Findings of Fact:

(1) That the respondent, Valley Dairy Co., Inc., is a California corporation, whose address is 2401 Fletcher Drive, Glendale, California.

(2) That the respondent purchases fluid milk from producers in the Los Angeles Milk Shed and distributes said milk for consumption in the Los Angeles Sales Area and also has a production of its own milk produced in the Los Angeles Milk Shed which it distributes for consumption as fluid milk in the Los Angeles Sales Area.

(3) That the respondent, since the effective date of License No. 17 and prior thereto, including the period described in the license as the "production base period", has been engaged in distributing fluid milk for consumption in the Los Angeles Sales Area and was a licensee duly licensed under License No. 17 from the effective date of said License No. 17, November 20, 1933, until the termination of said License on May 31, 1934.

(4) That the respondent, since the effective date of License No. 57, has been and is in the business of distributing, marketing and handling milk and cream as a distributor in the Los Angeles Sales Area and is a licensee duly licensed under License No. 57.

(5) That in the marketing of fluid milk produced in the Los Angeles Milk Shed and in the distribution of said fluid milk in the Los Angeles Sales Area, both interstate and intrastate commerce are so inextricably intermingled that said marketing and distribution of fluid milk in the Los Angeles Sales Area are in the current of interstate commerce. And further that intrastate com-

merce in such marketing and distribution of fluid milk in the Los Angeles Sales Area affects, burdens, and competes with interstate commerce in such marketing and distribution of fluid milk and of milk products in such a manner as to bring the distribution and marketing of fluid milk within said area in the current of interstate commerce and under the power of regulation vested in the Secretary of Agriculture by the Agricultural Adjustment Act, and the business of the respondent in the marketing and distribution of fluid milk within said area is such as to bring it within the said current of interstate commerce.

(6) That certain producers from whom the respondent purchased fluid milk did, at various times during the period, ship fluid milk to the surplus plant operated by Milk Producers, Inc., which is successor to Producers Arbitration Committee, Inc., as provided for in said License No. 17.

(7) That large quantities of the butter, cheese and other dairy products manufactured at the surplus plant operated by Milk Producers, Inc., which is successor to Producers Arbitration Committee, Inc., from milk delivered to said plant by producers within the said area, were shipped in interstate commerce.

(8) That the Los Angeles Milk Industry Board was duly organized in accordance with the terms of said License No. 17; that the said Board was composed of thirteen members who were properly selected in accordance with the provisions of Exhibit D of said license, all of which appointments to said Board were approved by the Secretary, as provided for in said license.

(9) That the said Los Angeles Milk Industry Board has functioned continuously since its creation in the performance of its duties, as set forth in said License No. 17.

(10) That the said Los Angeles Milk Industry Board, in accordance with the provisions of Exhibit D of the said License, made certain arrangements to determine under the provisions of Paragraph 9 of Exhibit C of said License No. 17 whether the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area had become so decreased as to render impractical in its opinion the accounting for such variations through adjustments in the base price paid producers.

(11) That pursuant to Paragraph 9 of Exhibit C of License No. 17, the Los Angeles Milk Industry Board determined that the daily average quantity of milk sold for consumption in the Los Angeles Sales Area had become so decreased as to render impractical the accounting for such variations through adjustments in the base price as provided for in Paragraph 4, Schedule "C", "Establishment of Adjusted Base Price."

(12) That pursuant to Paragraph 9 of Exhibit C of License No. 17, Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., made certain uniform decreases for each month in all existing established bases of producers to the end that the sum total of all bases adjusted would again approximate in amount the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area.

(13) That the various percentages of scale downs in existing established bases of producers by said Milk Producers, Inc., successors to Producers Arbitration Committee, Inc., for the respective periods were approved by the Los Angeles Milk Industry Board and by the Secretary, as provided by Paragraph 9 of Exhibit C of License No. 17—"Establishment of Adjusted Base Price."

(14) That the existing established base of each producer was determined by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., on the basis of deliveries of producers during the base period March 16, 1933, to June 15, 1933, both dates inclusive, ascertained from reports of distributor which include producer-distributors covering deliveries to them or milk produced by them for this period. The total deliveries of each producer divided by the number of days in the base period established the producer's general daily average base. This general daily average base was scaled down pursuant to Paragraph 9 of Exhibit C of License No. 17 to arrive at an adjusted basic average for each producer for the period. The resultant total was the quantity that the producer was to deliver or sell as base milk. Milk delivered or sold in excess of this monthly base was treated as surplus milk.

(15) That Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., was operating the surplus plant, as provided for in Exhibit C of said License, accounting to producers delivering milk to it for the full base price as set forth in said License in respect of deliveries not in excess of the individual pro-

ducer's adjusted base as determined above, and for the surplus price in respect of deliveries in excess of producer's adjusted base.

(16) That the amounts determined by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., to be due and payable to it by distributors in the Los Angeles Sales Area, including the respondent, as surplus deductions, represented the difference between the base price and the surplus price for the various periods here under consideration as provided in said License No. 17 and were approved by the Los Angeles Milk Industry Board.

(17) That operating statements for the periods November 20, 1933, to November 30, 1933, December, 1933, January, 1934, and February, 1934, were prepared from the books and records of Milk Producers Inc., successor to Producers Arbitration Committee, Inc., which statements reflect the recorded transactions for the above named periods and reveal a loss attributable to the operation of the surplus plant for the periods above set forth.

(18) That the operating charges incurred by the surplus plant operated by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., were approved by the proper authorities and represent reasonable items of expense.

(19) That a charge of 1c per pound of butterfat was set up for the month of December, 1933, through adjustment of the base price for that period with respect to working capital and that the methods adopted by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., in arriving at the amounts to be charged to

working capital were ratified and approved by the Los Angeles Milk Industry Board, as provided by Paragraphs 7 and 8 of Exhibit C—"Establishment of Adjusted Base Price", of said License No. 17.

(20) That the methods adopted by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., in arriving at surplus deductions were reasonable and were approved by the Los Angeles Milk Industry Board and by the Secretary.

(21) That a small quantity of Grade B milk was handled by the surplus plant; that in the handling of said milk no loss was incurred and that the income from Grade B milk resulting from the sale of butter, powdered skim and other manufactured products arising therefrom more than offset the price paid for Grade B Milk and the manufacture thereof.

(22) That the Los Angeles Milk Industry Board is audited monthly by Martin J. Masters, certified public accountant, Los Angeles, California, which audits indicate that the items of expense incurred by said Board were proper in effectuating the purposes and principles embodied in License No. 17.

(23) That said licensee, its officers, employees and agents in the State of California at divers times since November 20, 1933, has violated Article III, Section 1 of said License under License No. 17 by purchasing fluid milk for distribution under terms and conditions other than those set forth in Exhibit A of said License.

(24) That the respondent failed to file, prior to the 5th day of each month, with the Chairman of the Los Angeles Milk Industry Board, a statement of (a) the

quantity of milk purchased from each producer; (b) the quantity produced and sold as fluid milk, as provided for by Paragraph 4 (a) of Article III of said license.

(25) That, pursuant to Paragraph 4 (b) of said license, the Los Angeles Milk Industry Board made a determination that distributors be billed at the rate of ¼c per pound butterfat contained in the milk purchased by distributors and ¼c per pound butterfat for all milk distributed.

(26) That the respondent purchased fluid milk, for distribution as Grade A market milk, from producers without obtaining the authorization of such producers to pay over to the Los Angeles Milk Industry Board amounts of ¼c for each pound of butterfat contained in said milk purchased by the respondent, determined by said board to be payable to it, and failed and refused to pay over to said Board said amounts and also an additional amount of ¼c for each pound of butterfat contained in milk produced by it.

(27) That the respondent was billed monthly for the above amounts determined by the Los Angeles Milk Industry Board to be due under Paragraph 4 (b) of Article III of said license, and subsequently corrected billings with respect to the foregoing periods were sent to the respondent in respect of the amounts determined by the Los Angeles Milk Industry Board to be due under Paragraph 4 (b) of Article III of said license.

(28) That the respondent failed to pay over to the Los Angeles Milk Industry Board the amount of ¼c, as a distributor, for each pound of butterfat contained in

the milk distributed by said respondent, as provided by Paragraph 4 (b) of Article III of said license.

(29) That, pursuant to provisions of Paragraph 4 (c) of Article III of said license, the Los Angeles Milk Industry Board made a determination each month of the average amount of the deductions which the members of the associations therein named authorized the distributors to pay over to such associations in behalf of their respective members, for the purpose of determining an amount to be paid equal to said average by producers not members of the associations therein named to the Los Angeles Milk Industry Board; that said determination were corrected in accordance with reports submitted to it by said associations.

(30) That the said respondent purchased milk for distribution as Grade A Market milk from producers not members of the associations therein named without obtaining the authorization of such producers to pay over to the Los Angeles Milk Industry Board the amounts determined by the Los Angeles Milk Industry Board under Paragraph 4 (c) as due and payable to it.

(31) That the said respondent was billed monthly for the amounts determined to be due by the Los Angeles Milk Industry Board under Paragraph 4 (c) of Article III of said license; and later was furnished with corrected billings with respect to said amounts; that the respondent failed to pay over to the Los Angeles Milk Industry Board said corrected amounts so determined by said Board to be payable to it.

(32) That the respondent has failed to pay and has not paid to the Los Angeles Milk Industry Board the

deductions required in accordance with the provisions of Paragraph 4 (b) and Paragraph 4 (c) of Article III of said License which payments were required to be made at the time for making payments to producers for milk purchased pursuant to Paragraph 4 (d) of said License No. 17.

(33) That the respondent purchased milk for distribution as Grade A Market Milk from the producers who were not members of the associations listed in Paragraph 4 of Article III of said license and that the respondent did not and has not secured the authorization of such producers to deduct as surplus deductions each month the amounts required to be deducted in accordance with the provisions of Paragraph 5 (b) of Article III of said license.

(34) That the Los Angeles Milk Industry Board made a determination of the amounts due and payable to the Milk Producers, Inc., as surplus deductions.

(35) That the respondent was billed monthly for the amounts determined to be payable as surplus deductions to Milk Producers, Inc., as provided for by Paragraph 5 (b) and Paragraph 5 (c) of Article III of said License and that subsequently corrected billings were sent to the respondent with respect to the amounts due and payable as surplus deductions to Milk Producers, Inc., successor to Producers Arbitration Committee, Inc.

(36) That the respondent failed to pay the sums estimated as surplus deductions to Milk Producers, Inc., successors to Producers Arbitration Committee, Inc., for each month, as provided for by Paragraph 5 (b) and

Paragraph 5 (c) of Article III and Exhibit C of said license.

(37) That the failure by the respondent to comply with each and all of the aforesaid provisions of License No. 17 constitutes a violation of the respective provisions of said License No. 17 and also constitutes a violation of Paragraph 4, Section 7, Article II of License No. 57, License for Milk—Los Angeles, California, Sales Area.

CONCLUSION

Based upon the foregoing Findings of Fact I hereby determine and conclude that the facts and circumstances proved in this case establish and prove the charges Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15 and 16 of the said Order to Show Cause and prove the violations by the respondent of License No. 17, as charged therein, and therefore establish and prove violation by the respondent of Article II, Section 7, Paragraph 4 of License No. 57, as charged in the amendment to the Order to Show Cause.

I further determine that any one of said violations of License No. 17 so established and proved warrants independently the revocation of the license of the respondent under License No. 57.

ORDER

The Secretary of Agriculture hereby issues the following Order:

It is Hereby Ordered that the License of Valley Dairy Co., Inc., a California corporation, under License No. 57, License for Milk, Los Angeles, California, Sales Area, be and it is hereby revoked.

It is Further Ordered that this Order shall become effective on and after 6:00 P.M., Pacific Time on the 28th day of July, 1934.

It is Further Ordered that a copy of this order be served on the Valley Dairy Company, Inc. by depositing the same in the United States mail registered and addressed to Valley Dairy Company, Inc. of Glendale, California at its last known address, to wit: 2401 Fletcher Drive, Glendale, California.

In Witness Whereof I have hereunto set my hand and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington, District of Columbia, this 28th day of July, 1934.

(Seal) (Signed) H. A. Wallace
Secretary of Agriculture.

EXHIBIT "G"

United States Department of Agriculture
Agricultural Adjustment Administration
Washington, D. C.

I, James K. Knudson, Acting Chief Hearing Clerk of the United States Department of Agriculture, Agricultural Adjustment Administration, pursuant to General Regulations, Series 7 thereof, do hereby certify:

1. That there has been filed in the office of the said Chief Hearing Clerk, a certain document in connection with a hearing held pursuant to Section 8 (3) of the Agricultural Adjustment Act, relating to the revocation and suspension of a certain license, to-wit:

LUCERNE CREAM AND BUTTER COMPANY,
a California corporation. Case No. 17-1-6

which said document is now on file in the office of the Chief Hearing Clerk, and is as follows: Findings of Fact and Order of the Secretary Signed by H. A. Wallace, Secretary of Agriculture, on the 28th day of July, 1934.

2. A true and correct copy of said document is attached hereto.

WITNESS my hand and official seal this 28th day of July, A.D. 1934.

(SEAL) JAMES K. KNUDSON,
Acting Chief Hearing Clerk United States Department of Agriculture Agricultural Adjustment Administration

(Signed) JOSEPH A. WALSH
Deputy Hearing Clerk

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
WASHINGTON, D. C.

IN THE MATTER OF
LUCERNE CREAM AND BUTTER COMPANY, a California Corporation

Before the Secretary of Agriculture
Case No. 17-1-6

FINDINGS OF FACT AND ORDER OF THE SECRETARY

On November 16, 1933, the Secretary of Agriculture duly issued License No. 17, License for Milk—Los Angeles Milk Shed, effective November 20, 1933, and con-

tinuously since said date the Lucerne Cream and Butter Company. a California Corporation, has been a distributor of fluid milk for consumption in the Los Angeles Sales Area and was a licensee under said License No. 17 from the effective date of said License No. 17 until the termination of said License No. 17 on May 21, 1934.

On February 21, 1934, a written order of the Secretary, as provided for in General Regulations, Series 3, Sections 200 and 201, requiring respondent to show cause on or before the 5th day of March, 1934, why its said License No. 17 should not be revoked or suspended by the Secretary, was duly served upon the respondent.

The said Order to Show Cause contained the following statements of the alleged violations of the terms and conditions of the license by the respondent:

(1) That said licensee, its officers, employees, and agents at divers times since November 20, 1933, has violated the terms and conditions of said license.

(2) That said licensee, its officers, employees, and agents at divers times since November 20, 1933, has violated Article III, Paragraph 1 of said license by purchasing fluid milk for distribution as fluid milk in the Los Angeles Sales Area at prices and under terms and conditions different from those provided for in said paragraph and as set forth in Exhibit "A" of the license.

(3) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 3 of said license, in that it has purchased and distributed fluid milk in violation of the terms and conditions as set forth in the Produc-

tion and Surplus Control Plan provided for in Exhibit "C" of the license.

(4) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 4 (a) of said license by failing and refusing to file reports and statements with the Chairman of the Los Angeles Milk Industry Board, as provided for in said paragraph.

(5) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 4 (b) of said license by purchasing milk from producers for distribution as Grade "A" market milk in violation of the terms and conditions of said paragraph.

(6) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 4 (b) of said license by purchasing milk from producers for distribution as Grade "A" market milk in violation of the terms and conditions of said paragraph in that it has purchased fluid milk for consumption in the Los Angeles Sales Area from producers without being authorized by said producers to make the deductions as provided for in said paragraph of the license and without making said deductions.

(7) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 4 (b) of said license by failing and refusing to pay to the Los Angeles Milk Industry Board the amounts deducted from producers, as provided for in said paragraph of the license.

(8) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 4 (b) of said license by failing and refusing to pay as a distributor to the Los Angeles Milk Industry Board the amounts therein required to be paid by it as a distributor.

(9) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 4 (c) of said license by purchasing milk for distribution as Grade "A" market milk from producers in violation of the terms and conditions of said paragraph of said license.

(10) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 4 (c) of said license by purchasing milk for distribution as Grade "A" market milk from producers in violation of the terms and conditions of said paragraph of said license, and by failing and refusing to make the payments to the Los Angeles Milk Industry Board, as required by said paragraph of said license.

(11) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 4 (d) of said license by failing and refusing to comply with the terms and conditions of said paragraph of said license.

(12) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 5 (a) of said license by failing and refusing to comply with the terms and conditions of its license, as set forth in said paragraph.

(13) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 5 (b) of said license by failing and refusing to comply with the terms and conditions of its license, as set forth in said paragraph.

(14) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 5 (a) and (b) of said license by purchasing milk for distribution as Grade "A" market milk in the Los Angeles Sales Area from producers who are not members of any of the associations of producers listed in Paragraph 4 of Article III of said license without authorization from such producers to deduct, or cause to be deducted by the particular association of producers, if any, of which any such producer is a member, each month, certain sums therein required to be deducted and paid to Producers' Arbitration Committee, Inc., or to its successor, Milk Producers, Inc., and without paying said sums to Milk Producers, Inc.

(15) That said licensee, its officers, employees, and agents, at divers times since November 20, 1933, has violated Article III, Paragraph 14 of said license by failing and refusing to comply with the terms and conditions of its license, as set forth in said paragraph.

In response to a telegraphic request by counsel for respondent in the above entitled case, the time for filing its answer to said Order was extended to March 10, upon the condition that the hearing be held in Los Angeles, California, on March 16, 1934. Reserving its right to object to the jurisdiction of the Secretary or to the validity of the Order to Show Cause, this condition was

agreeable to counsel for respondent, and a voluminous Answer, consisting of thirty three pages with four attached exhibits was filed within the time specified to the charges set forth in said Order to Show Cause, in accordance with General Regulations, Series 3. In said Answer the respondent, after objecting and excepting to the jurisdiction of the Secretary of Agriculture to hear or determine the issues presented in this matter, denied each and all of the allegations contained in the Order to Show Cause and alleged numerous specific grounds as matters of defense to the charges made in said order. This Answer is contained in Government Exhibit No. 1 which was submitted for the record made at the hearing.

A hearing was held on March 16, 1934, at 10 o'clock A.M., in the Assembly Room of the California State Building, Los Angeles, California, in accordance with the order of the Secretary, and as agreed to by counsel for the respondents, before Arthur P. Curran, Esq., Presiding Officer, an officer and employee of the United States Department of Agriculture, duly designated and appointed by the Secretary. The respondent appeared and was represented by attorneys Edward M. Selby and William T. Selby. The Secretary of Agriculture was represented by C. P. Dorr, Esq., and A. D. Hadley, Esq., of Washington, D. C.

It was stipulated at the hearing by counsel for all parties that the above entitled case be consolidated with the cases of Charles J. Kurtz, Valley Dairy Company, and Western Holstein Farms, Inc. for the purpose of the trial, and that in determination of each case, the

testimony applicable to all four cases, as well as the testimony pertaining to that particular case, should be considered.

At the outset, counsel for respondent raised certain objections to the jurisdiction of the Secretary to try the issues raised by the Order to Show Cause and the Answer, which objections were overruled. Various motions to dismiss the proceedings based on lack of jurisdiction were also offered by counsel for respondent. After extended argument by both counsel for respondent and counsel for the Government, and upon consideration of the authorities submitted, the various motions to dismiss were denied. At said hearing, after objecting to the introduction of any and all of the testimony to be introduced by counsel for the Secretary, counsel for the respondent participated fully in the proceedings and cross-examined fully the witnesses produced on behalf of the Secretary.

After ten full days consumed in the taking of testimony, on April 12, 1934, by agreement of counsel representing all parties, the hearing was adjourned until such time as the audit being made of the Los Angeles Milk Industry Board and Milk Producers, Inc., by representatives of the Comptroller of the Department of Agriculture, was completed. It was stipulated that the audit should be received in evidence at an adjourned hearing to be held in Washington in lieu of further cross-examination of Mr. Evans, Accountant for the Milk Producers, Inc., and that this audit should be considered by the Secretary in arriving at his final determinations with respect to the issues raised herein. How-

ever, it was further agreed that the respondents were to have the privilege to present such additional evidence as might come to their attention during the adjournment. Counsel for the respondent submitted to the auditors a statement of the various contentions for their consideration in completing the audit. The auditors considered these various contentions in making their audit and the audit was completed as agreed and copies furnished to the parties herein.

On May 31, 1934, the Secretary terminated License No. 17, License for Milk—Los Angeles Milk Shed, effective on and after 12:01 A.M., Eastern Standard Time, June 1, 1934. In said order of termination it was provided that "any and all obligations which have arisen, or which may hereafter arise in connection therewith, by virtue of, or pursuant to, such license, shall be deemed not to be affected, waived, or terminated hereby."

On May 31, 1934, the Secretary duly issued License No. 57, License for Milk—Los Angeles, California, Sales Area, effective June 1, 1934, and continuously since said date the Lucerne Cream and Butter Company, a California corporation, has been engaged in the business of distributing, marketing, or handling milk or cream as a distributor in the Los Angeles Sales Area and is a licensee duly licensed under said License No. 57. In Paragraph 4, Section 7, Article II, of said License No. 57 it was provided that: "Each and every distributor shall fulfill any and all of his obligations which shall have arisen or which may hereafter arise in connection with, by virtue of, or pursuant to, the License for Milk in the Los Angeles Sales Area issued by the Secretary on November 16, 1933".

Pursuant to notice duly served upon the respondents, and in accordance with the agreement entered into by the parties on April 12, 1934, the matter came on for further hearing on June 14, 1934, at Washington, D. C. Counsel for the respondents and counsel for the Government appeared at said adjourned hearing at the time and place specified in said notice. At the hearing, the audits, completed by the auditors of the Department of Agriculture, were introduced in evidence. After objecting to the introduction of the audits, which objections were overruled, counsel for the respondents examined Mr. Manley, under whose supervision the audits were made, with respect to various matters contained in the aforesaid audits.

On June 18, 1934, at the adjourned hearing, counsel for the Secretary moved to amend the Order to Show Cause, issued in the above entitled case, charging the respondent with failure to fulfill its obligations under the prior License No. 17, as provided for by Paragraph 4, Section 7, Article II of License No. 57, License for Milk—Los Angeles, California, Sales Area, and in connection therewith offered for the record the order of the Secretary terminating License No. 17 and a certified copy of the new License No. 57. The order of the Secretary terminating License No. 17 was admitted in evidence without objection. Subject to respondent's objection, the Presiding Officer granted leave to counsel for the Government to amend the Order to Show Cause and received in evidence Government Exhibit No. 51 which was a certified copy of License No. 57. The amendment to the Order to Show Cause was presented by counsel for the Secretary and incorporated in the Record. There-

upon, counsel for the respondent refused to participate further in the case and, waiving oral argument upon the record as thus made, asked permission to file a brief with respect to the propriety of the granting of the motion to amend said Order to Show Cause. The permission was granted and counsel for the respondent thereupon withdrew from the hearing.

The fullest opportunity to be heard and produce evidence bearing upon the issues presented was afforded to the Secretary and to the respondent and both said parties were fully heard. At the close of the hearing neither counsel for the respondent nor for Government made any argument but were content to have the decision arrived at upon the record as made and brief filed therein. The hearing consumed twelve full days.

Thereafter the Presiding Officer made Findings of Fact and a Recommendation and reported the Same to the Secretary together with the record of the proceedings including the Order to Show Cause, Answer, stenographic report of all the oral testimony and all the documentary evidence offered and received, and a brief filed by the respondent with a transcript of all testimony and documentary evidence offered and received in the aforesaid four consolidated cases, and the briefs filed therein.

Upon the record thus made, the Secretary of Agriculture in addition to the foregoing, makes the following Specific Findings of Fact:

(1) That the respondent, Lucerne Cream and Butter Company, is a California corporation whose address is 4300 South Alameda St., Vernon, California.

(2) That the respondent purchases fluid milk from producers in the Los Angeles Milk Shed and distributes said milk for consumption as fluid milk in the Los Angeles Sales Area.

(3) That the respondent, since the effective date of License No. 17 and prior thereto, including the period described in the license as the "production base period", has been engaged in distributing fluid milk for consumption in the Los Angeles Sales Area and was a licensee duly licensed under License No. 17 from the effective date of said License No. 17, November 20, 1933, until the termination of said License on May 31, 1934.

(4) That the respondent, since the effective date of License No. 57, has been and is in the business of distributing, marketing and handling milk and cream as a distributor in the Los Angeles Sales Area and is a licensee duly licensed under License No. 57.

(5) That in the marketing of fluid milk produced in the Los Angeles Milk Shed and in the distribution of said fluid milk in the Los Angeles Sales Area, both interstate and intrastate commerce are so inextricably intermingled that said marketing and distribution of fluid milk in the Los Angeles Sales Area are in the current of interstate commerce. And further that intrastate commerce in such marketing and distribution of fluid milk in the Los Angeles Sales Area affects, burdens, and competes with interstate commerce in such marketing and distribution of fluid milk and of milk products in such a manner as to bring the distribution and marketing of fluid milk within said area in the current of interstate commerce and under the power of regulation vested

in the Secretary of Agriculture by the Agricultural Adjustment Act, and the business of the respondent in the marketing and distribution of fluid milk within said area is such as to bring it within the said current of interstate commerce.

(6) That certain producers from whom the respondent purchased fluid milk did, at various times during the period covered by License No. 17, ship fluid milk to the surplus plant operated by Milk Producers, Inc., which is successor to Producers Arbitration Committee, Inc., as provided for in said License No. 17.

(7) That large quantities of the butter, cheese and other dairy products manufactured at the surplus plant operated by Milk Producers, Inc., which is successor to Producers Arbitration Committee, Inc., from milk delivered to said plant by producers within the said area, were shipped in interstate commerce.

(8) That the Los Angeles Milk Industry Board was duly organized in accordance with the terms of said License No. 17; that the said Board was composed of thirteen members who were properly selected in accordance with the provisions of Exhibit D of said license, all of which appointments to said Board were approved by the Secretary, as provided for in said license.

(9) That the said Los Angeles Milk Industry Board has functioned continuously since its creation in the performance of its duties, as set forth in said License No. 17.

(10) That the said Los Angeles Milk Industry Board, in accordance with the provisions of Exhibit D of the said License, made certain arrangements to determine

under the provisions of Paragraph 9 of Exhibit C of said License No. 17 whether the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area has become so decreased as to render impractical in its opinion the accounting for such variations through adjustments in the base price paid producers.

(11) That pursuant to Paragraph 9 of Exhibit C of License No. 17, the Los Angeles Milk Industry Board determined that the daily average quantity of milk sold for consumption in the Los Angeles Sales Area had become so decreased as to render impractical the accounting for such variations through adjustments in the base price as provided for in Paragraph 4, Schedule "C", "Establishment of Adjusted Base Price".

(12) That pursuant to Paragraph 9 of Exhibit C of License No. 17, Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., made certain uniform decreases for each month in all existing established bases of producers to the end that the sum total of all bases adjusted would again approximate in amount the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area.

(13) That the various percentages of scale downs in existing established bases of producers by said Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., for the respective periods were approved by the Los Angeles Milk Industry Board and by the Secretary, as provided by Paragraph 9 of Exhibit C of License No. 17—"Establishment of Adjusted Base Price".

(14) That the existing established base of each producer was determined by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., on the basis of deliveries of producers during the base period March 16, 1933, to June 15, 1933, both dates inclusive, ascertained from reports of distributors, which include producer-distributors, covering deliveries to them or milk produced by them for this period. The total deliveries of each producer divided by the number of days in the base period established the producer's general daily average base. This general daily average base was scaled down pursuant to Paragraph 9 of Exhibit C of License No. 17 to arrive at an adjusted basic average for each producer for the period. The resultant total was the quantity that the producer was to deliver or sell as base milk. Milk delivered or sold in excess of this monthly base was treated as surplus milk.

(15) That Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., was operating the surplus plant, as provided for in Exhibit C of said License, accounting to producers delivering milk to it for the full base price as set forth in said License in respect of deliveries not in excess of the individual producer's adjusted base as determined above, and for the surplus price in respect of deliveries in excess of producer's adjusted base.

(16) That the amounts determined by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., to be due and payable to it by distributors in the Los Angeles Sales Area including the respondent as surplus deductions, represented the difference between

the base price and the surplus price for the various periods here under consideration as provided in said License No. 17 and were approved by the Los Angeles Milk Industry Board.

(17) That operating statements for the periods November 20, 1933, to November 30, 1933, December, 1933, January, 1934, and February, 1934, were prepared from the books and records of Milk Producers Inc., successor to Producers Arbitration Committee, Inc., which statements reflect the recorded transactions for the above named periods and reveal a loss attributable to the operation of the surplus plant for the periods above set forth.

(18) That the operating charges incurred by the surplus plant operated by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., were approved by the proper authorities and represent reasonable items of expense.

(19) That a charge of 1c per pound of butterfat was set up for the month of December, 1933, through adjustment of the base price for that period with respect to working capital and that the methods adopted by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., in arriving at the amounts to be charged to working capital were ratified and approved by the Los Angeles Milk Industry Board, as provided by Paragraphs 7 and 8 of Exhibit C—"Establishment of Adjusted Base Price", of said License No. 17.

(20) That the methods adopted by Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., in arriving at surplus deductions were reasonable and

were approved by the Los Angeles Milk Industry Board and by the Secretary.

(21) That a small quantity of Grade B milk was handled by the surplus plant; that in the handling of said milk no loss was incurred and that the income from Grade B milk resulting from the sale of butter, powdered skim and other manufactured products arising therefrom more than offset the price paid for Grade B milk and the manufacture thereof.

(22) That the Los Angeles Milk Industry Board is audited monthly by Martin J. Masters, certified public accountant, Los Angeles, California, which audits indicate that the items of expense incurred by said Board were proper in effectuating the purposes and principles embodied in License No. 17.

(23) That said licensee, its officers, employees and agents in the State of California at divers times since November 20, 1933, has violated Article III, Section 1 of said License under License No. 17 by purchasing fluid milk for distribution under terms and conditions other than those set forth in Exhibit A of said License.

(24) That the respondent failed to file, prior to the 5th day of each month, with the Chairman of the Los Angeles Milk Industry Board, a statement of the quantity of milk purchased from each producer, as provided for by Paragraph 4 (a) of Article III of said license.

(25) That, pursuant to Paragraph 4 (b) of said license, the Los Angeles Milk Industry Board made a determination that distributors be billed at the rate of ¼c per pound butterfat contained in the milk purchased

by distributors and ¼c per pound butterfat for all milk distributed.

(26) That the respondent purchased fluid milk, for distribution as Grade A market milk, from producers without obtaining the authorization of such producers to pay over to the Los Angeles Milk Industry Board amounts of ¼c for each pound of butterfat contained in said milk purchased by the respondent, determined by said board to be payable to it, and failed and refused to pay over said amounts to said Board.

(27) That the respondent was billed monthly for the above amounts determined by the Los Angeles Milk Industry Board to be due under Paragraph 4 (b) of Article III of said license, and subsequently corrected billings with respect to the foregoing periods were sent to the respondent in respect of the amounts determined by the Los Angeles Milk Industry Board to be due under Paragraph 4 (b) of Article III of said License.

(28) That the respondent failed to pay over to the Los Angeles Milk Industry Board the amount of ¼c, as a distributor, for each pound of butterfat contained in the milk distributed by said respondent, as provided by Paragraph 4 (b) of Article III of said License.

(29) That, pursuant to provisions of Paragraph 4 (c) of Article III of said license, the Los Angeles Milk Industry Board made a determination each month of the average amount of the deductions which the members of the associations therein named authorized the distributors to pay over to such associations in behalf of their respective members, for the purpose of determining an amount to be paid equal to said average by producers not mem-

bers of the associations therein named to the Los Angeles Milk Industry Board; that said determinations were corrected in accordance with reports submitted to it by said associations.

(30) That the said respondent purchased milk for distribution as Grade A market milk from producers not members of the associations therein named without obtaining the authorization of such producers to pay over to the Los Angeles Milk Industry Board the amounts determined by the Los Angeles Milk Industry Board under Paragraph 4 (c) as due and payable to it.

(31) That the said respondent was billed monthly for the amounts determined to be due by the Los Angeles Milk Industry Board under Paragraph 4 (c) of Article III of said license; and later was furnished with corrected billings with respect to said amounts; that the respondent failed to pay over to the Los Angeles Milk Industry Board said corrected amounts so determined by said Board to be payable to it.

(32) That the respondent has failed to pay and has not paid to the Los Angeles Milk Industry Board the deductions required in accordance with the provisions of Paragraph 4 (b) and Paragraph 4 (c) of Article III of said License which payments were required to be made at the time for making payments to producers for milk purchased pursuant to Paragraph 4 (d) of said License No. 17.

(33) That the respondent purchased milk for distribution as Grade A Market Milk from the producers who were not members of the Associations listed in Paragraph 4 of said license and that the respondent did not and has

not secured the authorization of such producers to deduct as surplus deductions each month the amounts required to be deducted in accordance with the provisions of Paragraph 5 (b) of Article III of said License.

(34) That the Los Angeles Milk Industry Board made a determination of the amounts due and payable to the Milk Producers, Inc., as surplus deductions.

(35) That the respondent was billed monthly for the amounts determined to be payable as surplus deductions to Milk Producers, Inc., as provided for by Paragraph 5 (b) of Article III of said License, and that subsequently corrected billings were sent to the respondent with respect to the amounts due and payable as surplus deductions to Milk Producers, Inc., successor to Producers Arbitration Committee, Inc.

(36) That the respondent failed to pay the sums estimated as surplus deductions to Milk Producers, Inc., successor to Producers Arbitration Committee, Inc., for each month, as provided for by Paragraph 5 (b) of Article III and Exhibit C of said license.

(37) That the failure by the respondent to comply with each and all of the aforesaid provisions of License No. 17 constitutes a violation of the respective provisions of said License No. 17 and also constitutes a violation of Paragraph 4, Section 7, Article II of License No. 57, License for Milk—Los Angeles, California, Sales Area.

Conclusion

Based upon the foregoing Findings of Fact I hereby determine and conclude that the facts and circumstances proved in this case establish and prove the charges Nos. (1), (2), (3), (4), (5), (6), (7), (8), (9), (10),

(11) and (13) of the said Order to Show Cause, and they prove the violations by the respondent of License No. 17, as charged therein, and, therefore, establish and prove violation by the respondent of Article II, Section 7, Paragraph 4 of License No. 57 as charged in the amendment to the Order to Show Cause.

I further determine that any one of said violations of License No. 17 so established and proved warrants independently the revocation of the license of the respondent under License No. 57.

ORDER

The Secretary of Agriculture hereby issues the following Order:

IT IS HEREBY ORDERED that the License of LUCERNE CREAM AND BUTTER COMPANY, a California Corporation, under License No. 57, License for Milk, Los Angeles, California, Sales Area, be and it is hereby revoked.

IT IS FURTHER ORDERED that this Order shall become effective on and after 6:00 P.M., Pacific Time on the 28th day of July, 1934.

IT IS FURTHER ORDERED that a copy of this order be served on the Lucerne Cream and Butter Company of Los Angeles, California, by depositing the same in the United States mail registered and addressed to Lucerne Cream and Butter Company, Los Angeles, California at its last known address, to-wit: 1925 East Vernon Ave., Los Angeles, California.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the official seal of the Department of Agriculture to be affixed

in the City of Washigton, this 28th day of July, 1934.

(SEAL) (Signed) H. A. WALLACE
Secretary of Agriculture.

(Endorsed). Supplemental Bill of Complaint for Injunction. Filed Sep 4 1934. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

(Lewis D. Collings, Edward M. Selby, Walter F. Haas, Harold C. Johnston, Attorneys for Plaintiffs.)

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

CHARLES J. KURTZ, doing business as Golden West Creamery Company, WESTERN HOLSTEIN FARMS, INC., a corporation, VALLEY DAIRY CO., INC., a corporation, THE LUCERNE CREAM & BUTTER COMPANY, a corporation.
Plaintiffs,

vs.

HARRY W. BERDIE, LOS ANGELES MILK INDUSTRY BOARD, MILK PRODUCERS, INC., a California corporation, RICHARD CRONSHEY, WILLIAM CORBETT, DAVID P. HOWELLS, GEORGE A. CAMERON, F. A. LUCAS, EARL MAHARG, A. G. MARCUS, M. H. ADAMSON, T. E. DAY, W. H. STABLER, MAX BUECHERT, C. W. HIBBERT, W. J. KUHRT, GEORGE E. PLATT, A. M. MCOMIE, T. H. BRICE, T. M. ERWIN, A. R. READ, R. C. PERKINS, ROSS WEAVER, ANDERS LARSEN, H. C. DARGER, PIERSON M. HALL, as United States District

Attorney for the Southern District of California, JOHN FOUR, JOHN FIVE, JOHN SIX, JOHN SEVEN, JOHN EIGHT, JOHN NINE, JOHN TEN, JOHN ONE COMPANY, a co-partnership, JOHN TWO COMPANY, a co-partnership, JOHN THREE COMPANY, a co-partnership, JOHN ONE COMPANY, a corporation, JOHN TWO COMPANY, a corporation, JOHN THREE COMPANY, a corporation,

Defendants.

In Equity No. 144-C

ORDER TO SHOW CAUSE AND RESTRAINING ORDER.

On reading the motion to file the supplemental bill in equity of plaintiffs herein, and upon consideration of the verified supplemental bill of complaint for injunction attached to said motion, and good cause appearing therefor,

IT IS HEREBY ORDERED that the defendants above named, and each of them, be and appear before the Honorable George Cosgrave, Judge, in the court room at room No. 422 in the Federal Building, Los Angeles, California, on the 20th day of August, 1934, at the hour of ten o'clock A. M. of said day, then and there to show cause, if any they or any of them have, why a temporary injunction should not issue herein restraining and enjoining said defendants, and each of them, their agents, attorneys, successors and employees, during the pendency of this action, from

(a) Making any of the demands and committing any of the acts with relation to these plaintiffs, complained

of in the proposed supplemental complaint of plaintiffs herein; and

(b) From in any manner interfering with plaintiffs, or any of them, in the conduct of their respective business by any form of civil or criminal proceedings, or otherwise; and

(c) From enforcing or attempting to enforce, as against the plaintiffs, or any of them, any of the terms and provisions of Licenses Nos. 17 and 57 of the United States Department of Agriculture, Argicultural Adjustment Administration, Los Angeles, California, Sales Area; and

(d) From collecting or attempting to collect from plaintiffs, or any of them, any of the sums of money demanded by defendants, or any of them, under the terms and provisions of said Licenses Nos. 17 and 57, either by civil or criminal proceedings, or otherwise, or from commencing, prosecuting or maintaining any action against any of the plaintiffs for the collection of any of said sums, or from taking any action against the said plaintiffs, or any of them, by any form of civil or criminal proceeding, or otherwise, to enforce any penalty or penalties prescribed in the National Agricultural Adjustment Act, or in any rules or regulations purported to have been issued thereunder by the Secretary of Agriculture;

And Pending the Hearing of This Order to Show Cause and Until the Further Order of This Court the said defendants, and each of them, their agents, attorneys, successors and employees, are hereby restrained from

(a) Making any of the demands or committing any of the acts with relation to these plaintiffs, or any of them, as set forth in the proposed supplemental bill of complaint of plaintiffs herein;

(b) From in any manner interfering with plaintiffs, or any of them, in the conduct of their respective businesses by any form of civil or criminal proceeding, or otherwise;

(c) From enforcing or attempting to enforce, as against the plaintiffs or any of them, any of the terms and/or provisions of Licenses No. 17 and No. 57 of the United States Department of Agriculture, Agricultural Adjustment Administration, Los Angeles, California Sales Area;

(d) From collecting or attempting to collect from plaintiffs, or any of them, any of the sums of money demanded under the terms and provisions of said Licenses No. 17 and No. 57, as in said proposed supplemental bill set forth, either by civil or criminal proceedings, or otherwise;

(e) From commencing, prosecuting or maintaining any action against any of the plaintiffs for the collection of any of said sums, or from taking any action against the said plaintiffs, or any of them, by any form of civil or criminal proceedings, or otherwise, to enforce any penalty or penalties prescribed in the National Agricultural Adjustment Act, or in any rules or regulations purported to be issued thereunder by the Secretary of Agriculture.

Done in open court this 9th day of August, 1934.

GEO. COSGRAVE

Judge.

Filed Aug 9 1934 R. S. Zimmerman Clerk By L. Wayne Thomas Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

CHARLES W. KURTZ, et al,
Plaintiffs,

vs.

HARRY W. BERDIE, et al,
Defendants.

In Equity No. 144-C

NOTICE OF MOTION TO DISMISS PROCEEDING

To the plaintiffs Charles J. Kurtz, doing business as Golden West Creamery Company; Western Holstein Farms, Inc., a corporation; Valley Dairy Co., Inc., a corporation; The Lucerne Cream & Butter Company, a corporation; and to: Lewis D. Collings, Amos Friedman, Walter F. Haas, Harold C. Johnston, Edward M. Selby, and William Selby, their attorneys:

YOU AND EACH OF YOU WILL TAKE NOTICE that the defendants Los Angeles Milk Industry Board, Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Irwin, A. R. Read, R. C. Perkins, and Ross Weaver, for themselves alone

and severing from their codefendants herein, will move the above entitled court in the Department of the Hon. Geo. Cosgrave, on Tuesday, the 4th day of September, 1934, at the hour of 10 o'clock A. M. for an order of said court dismissing the above entitled proceeding.

Said motion will be based upon the pleadings, records, and files in said action, and upon the affidavits of W. J. Kuhrt, O. R. Fuller, and Earl Maharg, attached to said motion and made a part thereof, and upon the grounds stated in said motion, a copy of which motion is herewith served upon you.

E. H. Whitcombe
E. H. Whitcombe
Farrand & Slosson
By Leonard B. Slosson
Attorneys for defendants appearing herein

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Charles W. Kurtz, et al,
Plaintiffs,
vs.
Harry W. Berdie, et al,
Defendants.

In Equity No. 144-C

MOTION TO DISMISS PROCEEDING

Now come the defendants Los Angeles Milk Industry Board, Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. J.

Stabler, Max Beuchert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Irwin, A. R. Read, R. C. Perkins, and Ross Weaver, appearing for themselves alone and severing from their codefendants herein and upon the pleadings, records, and files in said action and upon the affidavits of W. J. Kuhrt, O. R. Fuller, and Earl Maharg hereto attached and made a part hereof, and five days notice of this motion having been given to Lewis D. Collings, Amos Friedman, Walter F. Haas, Harold C. Johnston, Edward M. Selby, and William T. Selby, attorneys for the plaintiff herein, move the court for an order dismissing the above entitled action upon the following grounds;

I.

That the Hon. Henry A. Wallace, Secretary of the Department of Agriculture of the United States is a necessary and indispensable party-defendant to said action, but is not named as such in the proposed supplemental bill of complaint for injunction.

II.

That the License #17 upon which said proposed amended bill of complaint for injunction purports to state a cause of action was on the 1st day of June, 1934, terminated by the Secretary of Agriculture of the United States and the same is no longer in force or effect; that license #57 upon which said supplemental bill of complaint for injunction is also based contains no provision authorizing the existence of the defendant Los Angeles Milk Industry Board and that any and all questions involved therein are moot and can raise no issue.

III.

That none of the plaintiffs are now engaged in business but that prior to the filing of the motion for leave to file supplemental bill for injunction, and prior to the issuance of the temporary restraining order herein, each, every, and all of said plaintiffs, transferred to other individuals or corporations all of their assets, and hence cannot suffer any irreparable injury or damage whatsoever.

IV.

That the record herein fails to disclose any basis upon which the plaintiffs are entitled to any equitable relief.

WHEREFORE the defendants appearing herein pray that this honorable court issue an order dismissing the above entitled action and that the defendants may go hence with their costs incurred herein, and for such other and further relief as to this court may seem just and meet.

E. H. WHITCOMBE
E. H. Whitcombe
FARRAND & SLOSSON
By Leonard B. Slosson
Attorneys for defendants appearing herein

(Endorsed): Filed Aug. 28, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

CHARLES W. KURTZ, et al,
Plaintiffs,

vs.

HARRY W. BERDIE, et al,
Defendants.

No. 144-C, Equity

NOTICE OF MOTION TO DISMISS PROCEEDINGS

To the Plaintiffs: Charles J. Kurtz, doing business as Golden West Creamery Company; Western Holstein Farms, Inc., a corporation; Valley Dairy Co., Inc., a corporation; The Lucerne Cream & Butter Company, a corporation; and to: Lewis D. Collings, Amos Friedman, Walter F. Haas, Harold C. Johnston, Edward M. Selby, and William Selby, their attorneys:

You and each of you will please take notice that the defendant Harry W. Berdie for himself alone and severing from his co-defendants herein, will move the above entitled court in the department of the Honorable George Cosgrave, on Tuesday the 4th day of September, 1934, at the hour of ten o'clock A. M., for an order dismissing the above entitled proceedings.

Said motion will be based on the pleadings, records and files in the said action, on the affidavit of Harry W. Berdie, attached to said motion and made a part thereof,

upon the grounds stated in said motion, and upon the Points and Authorities attached to said motion and made a part thereof, a copy of which motion is herewith served upon you.

PEIRSON M. HALL,
Peirson M. Hall
United States Attorney,

CLYDE THOMAS,
Clyde Thomas
Assistant United States Attorney.

DATED: THIS 29th day of August, 1934.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

CHARLES W. KURTZ, et al,
Plaintiffs,

vs.

HARRY W. BERDIE, et al,
Defendants.

No. 144-C, Equity

MOTION TO DISMISS PROCEEDINGS

COMES Now the defendant Harry W. Berdie, for himself and alone, and severing from his co-defendants herein, and upon the pleadings, records and files in said action, and upon the affidavit of Harry W. Berdie, attached hereto and made a part hereof, and five days notice of this motion having been given to Lewis D.

Collings, Amos Friedman, Walter F. Haas, Harold C. Johnston, Edward M. Selby, and William Selby, attorneys for the plaintiffs herein, moves the court for an order dismissing the above entitled action upon the following grounds:

I.

That the Honorable Henry A. Wallace, Secretary of the Department of Agriculture of the United States, is a necessary and indispensable party-defendant to said action.

II.

That none of the plaintiffs are now engaged in business but that prior to the filing of the motion for leave to file supplemental bill for injunction, and prior to the issuance of the temporary restraining order herein, each, every, and all of said plaintiffs, transferred to other individuals or corporations all of their assets, and hence cannot suffer any irreparable injury or damage whatsoever.

III.

That this defendant is not and has not been since the 26th day of February, 1934, connected in any manner with the Agricultural Adjustment Administration or of the Department of Agriculture, and does not hold any official position thereunder.

WHEREFORE, the defendant Harry W. Berdie demands that this honorable court issue an order dismissing the above entitled action and that the said defendant may go hence with his costs, incurred herein, and for such

other and further relief as to this court may seem meet and just.

PEIRSON M. HALL,
Peirson M. Hall
United States Attorney,
CLYDE THOMAS,
Clyde Thomas
Assistant United States Attorney.

(Endorsed): Filed Aug. 29, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

CHARLES W. KURTZ, et al,
Plaintiffs,

vs.

HARRY W. BERDIE, et al,
Defendants.

In Equity No. 144-C

NOTICE OF MOTION TO DISMISS PROCEEDING

To the plaintiffs Charles J. Kurtz, doing business as Golden West Creamery Company; Western Holstein Farms, Inc., a corporation; Valley Dairy Co., Inc., a corporation; The Lucerne Cream & Butter Company, a corporation; and to Lewis D. Collings, Amos Friedman, Walter F. Haas, Harold C. Johnston, Edward M. Selby, and William T. Selby, their attorneys:

You and Each of You Will Please Take Notice that the defendant, Milk Producers, Inc., a California corporation, for itself alone and severing from its co-defendants herein, will move the above entitled court in the Department of the Hon. Geo. Cosgrave, on Tuesday the 4th day of September, 1934, at the hour of 10 o'clock A. M. for an order of said court dismissing the above entitled proceeding.

Said motion will be based upon the pleadings, records, and files in said action, and upon the affidavits of W. J. Kuhrt, O. R. Fuller, and Earl Maharg, attached to said motion and made a part thereof, and upon the grounds stated in said motion, a copy of which motion is herewith served upon you.

(Signed) E. H. Whitcombe
E. H. Whitcombe
Farrand & Slosson
By Leonard B. Slosson
Attorney for Defendant Milk Producers, Inc.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Charles J. Kurtz, et al,
Plaintiffs,

vs.

Harry W. Berdie, et al,
Defendants.

In Equity No. 144-C

MOTION TO DISMISS PROCEEDING

Now comes the defendant Milk Producers, Inc., a California corporation, appearing for itself alone and sever-

ing from its co-defendants herein and upon the pleadings, records, and files in said action and upon the affidavits of W. J. Kuhrt, O. R. Fuller, and Earl Maharg hereto attached and made a part hereof, and five (5) days notice of this motion having been given to Lewis D. Collings, Amos Friedman, Walter F. Haas, Harold C. Johnston, Edward M. Selby, and William T. Selby, attorneys for the plaintiffs herein, move the court for an order dismissing the above entitled action upon the following grounds:

I.

That the Hon. Henry A. Wallace, Secretary of the Department of Agriculture of the United States is a necessary and indispensable party-defendant to said action, but is not named as such in the proposed supplemental bill of complaint for injunction.

II.

That the license No. 17 upon which said proposed amended bill of complaint for injunction purports to state a cause of action was on the 1st day of June, 1934, terminated by the Secretary of Agriculture of the United States and the same is no longer in force or effect; that license No. 57 upon which said supplemental bill of complaint for injunction is also based contains no provisions authorizing the existence of the defendant Milk Producers, Inc., a California corporation, and that any and all questions involved therein are moot and can raise no issue.

III.

That none of the plaintiffs are now engaged in business but that prior to the filing of the motion for leave

to file supplemental bill for injunction, and prior to the issuance of the temporary restraining order herein, each, every, and all of said plaintiffs transferred all of their assets to other individuals or corporations, and hence cannot suffer any irreparable injury or damage whatsoever.

IV.

That the record herein fails to disclose any basis upon which the plaintiffs are entitled to any equitable relief.

WHEREFORE the defendants appearing herein pray that this honorable court issue an order dismissing the above entitled action and that the defendants may go hence with their costs incurred herein, and for such other and further relief as to this court may seem just and meet.

(Signed) E. H. Whitcombe
E. H. WHITCOMBE
FARRAND & SLOSSON
By Leonard B. Slosson (Signed)
Attorneys for Defendant Milk Producers, Inc.

(Endorsed): Filed Aug. 28, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

CHARLES J. KURTZ, et al.,
Plaintiffs,

vs.

HARRY W. BERDIE, et al.,
Defendants.

No. 144-C, Equity

OBJECTIONS TO THE APPLICATION OF PLAINTIFFS FOR A PRELIMINARY INJUNCTION AND TO THE APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL BILL OF COMPLAINT.

NOW COMES the defendants Anders Larsen, H. C. Darger and Peirson M. Hall, and object to the application of plaintiffs herein for a preliminary injunction and for leave to file a supplemental Bill of Complaint upon the following grounds:

I.

The proposed supplemental bill and the application for temporary injunction seek only to enjoin discretionary administrative functions which it is not within the power of a court of equity to enjoin.

II.

The Bill of Complaint does not name the Secretary of Agriculture as a party-defendant but all acts charged

in the Bill of Complaint are charged as being done by him and, under the law and the regulations, he is the only person who has authority to do the things charged except as to the defendant Peirson M. Hall, as United States Attorney for the Southern District of California, who has authority to institute proper court proceedings, and it is only charged upon "information and belief" that he "intends to and will" institute proceedings to enforce the orders of the said Secretary, and to enforce the penalties of the Act. No facts whatever are alleged showing the foundation of such information and belief.

III.

The only claim for relief set forth in the said Bill of Complaint is that the Agricultural Adjustment Act and the administration thereof is unconstitutional. The plaintiffs cannot assert the unconstitutionality of such Act and such license as they now hold monies which they collected under and by virtue of the terms of the Act and the license issued thereunder. This court cannot intervene and prevent the administration of the Act for the purpose of enabling plaintiffs to hold such money.

IV.

That plaintiffs to this action have claimed and asserted that they were no longer engaged in business and only allege in the proposed supplemental complaint that they were so engaged in business prior to and including July 28, 1934, which defeats any alleged irreparable damage or cause for equity to intervene as plaintiffs could assert

all defenses to any efforts to collect any penalties or monies due from the operation of said business prior thereto.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

(Endorsed): Filed Sept. 1, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 193..., of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, Calif., on Friday, the 7th day of September in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable Geo. Cosgrave, District Judge.

Charles J. Kurtz, et al., Plaintiffs,

vs.

Harry W. Berdie, et al., Defendants.

No. Eq. 144-C.

This cause having come before the Court on September 4th, 1934, for hearing on Motion of defendants Los Angeles Milk Industry Board, Richard Cronshey, William Corbett, David P. Howells, Geo. A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson. T. E. Day, W. H. Stabler, Max Buechert, C. W. Hib-

bert, W. J. Kuhrt, Geo. E. Platt, A. M. McOmie, T. H. Brice, T. M. Irwin, A. R. Read, R. C. Perkins and Ross Weaver, for themselves alone, for an Order vacating or dissolving the Temporary Restraining Order issued on August 9th, 1934, pursuant to Notice filed August 28th, 1934; for hearing on Motion of defendants Los Angeles Milk Industry Board, Richard Cronshey, William Corbett, David P Howells, Geo. A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, Geo. E. Platt, A. M. McOmie, T. H. Brice, T. M. Irwin, A. R. Read, R. C. Perkins and Ross Weaver, for themselves alone, for an Order dismissing the above entitled proceedings, pursuant to Notice filed August 28th, 1934; for hearing on Motion of defendant Milk Producers, Inc, a California corporation, for an Order vacating or dissolving the Temporary Restraining Order issued by this Court on August 9th, 1934, pursuant to Notice filed August 28th, 1934; for hearing on Motion of Milk Producers, Inc., a California corporation, for an Order dismissing the above entitled proceeding, pursuant to Notice filed August 28th, 1934; for hearing on Motion of Anders Larsen, H. C. Darger and Peirson M. Hall, for an Order vacating or dissolving the Temporary Restraining Order issued by this Court on August 9th, 1934, pursuant to Notice filed September 1st, 1934; for hearing on Objections filed September 1st, 1934, to Application of the plaintiffs for a Preliminary Injunction; and, for hearing on Order to Show Cause and Restraining Order filed August 9th, 1934, on Supplemental Bill in Equity of the plaintiffs

directed to defendants to show cause why Temporary Injunction should not issue; the Court, after having heard the argument of counsel, and thereupon ordered this cause stand submitted, and being now fully advised in the premises, orders the Motion of defendants Los Angeles Milk Industry Board, et al. for an Order vacating or dissolving the Temporary Restraining Order and the Motion of said defendants for an Order dismissing the above entitled proceedings, denied, for the reasons given in Memo of Decision filed on September 7th, 1934, in Case No. Eq.353-J, Hill, et al. vs. H. C. Darger, et al.; the Motion of Milk Producers, Inc., a California corporation, for an Order vacating or dissolving the Temporary Restraining Order, and the Motion of said defendant for an Order dismissing the above entitled proceeding, are denied for the reasons given in the said Memo of Decision, it being apparent that the District Court has acquired jurisdiction of the subject matter and that the Restraining Order may therefore properly issue; the Motion of Anders Larsen, et al. for an Order vacating or dissolving the Temporary Restraining Order, and the Objections filed September 1st, 1934, to the application of the plaintiffs for a Preliminary Injunction are likewise denied and overruled for the reasons given in the above Memorandum filed; and, the Order to Show Cause and Restraining Order, filed August 9th, 1934, on Supplemental Bill in Equity of the plaintiffs, directed to the defendants to show cause why Temporary Injunction should not issue. is granted; exception being noted for the defendants to the ruling of the Court.

[Title of Court and Cause]

In Equity No. 144-C.

PRELIMINARY INJUNCTION

This cause came on to be heard on the 4th day of September, 1934, before the Honorable George Cosgrave, Judge of the above entitled Court, on the Order to Show Cause heretofore issued herein on the 9th day of August, 1934, directing the defendants and each of them to show cause, if they or any of them had, why a temporary injunction should not issue herein, restraining and enjoining said defendants and each of them, their agents, attorneys, successors and employees, during the pendency of this action, from doing any of the things, making any of the demands or committing any of the acts as set forth in said Order to Show Cause; plaintiffs appearing by their Attorneys, Lewis D. Collings, Edward M. Selby and H. C. Johnston, and the defendants, Los Angeles Milk Industry Board, Milk Producers, Inc., a California corporation, Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Reed, R. C. Perkins and Ross Weaver, appearing by their Attorneys, E. H. Whitcombe and Farrand and Slosson, and the defendants, Anders Larsen, Enforcement Officer of the Agricultural Adjustment Administration of the United States Department of Agriculture for the Los Angeles Sales Area, H. C. Darger, Market Administrator under License No. 57, License for Milk, Los Angeles, California Sales Area,

Peirson M. Hall, United States District Attorney for the Southern District of California, and Harry W. Berdie, Regional Representative of the Licensing and Enforcement Section of the Agricultural Adjustment Administration of the United States Department of Agriculture, appearing by their Attorneys, Peirson M. Hall, United States Attorney and Clyde Thomas, Assistant United States Attorney; and

The Court having read the Bill for Injunction and Supplemental Bill of Complaint for Injunction heretofore filed by the plaintiffs herein, and the affidavits filed by the defendants herein, and counter-affidavits filed by the plaintiffs herein, and having heard and considered the arguments of respective counsel, and being fully advised in the premises; and

It appearing to the Court that on the 11th day of January, 1934, the said plaintiffs filed their Bill in this Honorable Court against the defendants herein for the purpose of having the said Court adjudge and decree that the License for Milk, Los Angeles Milk Shed, License No. 17, issued by the Secretary of Agriculture of the United States on November 16, 1933, and by authority of an Act known as the National Agricultural Adjustment Act, being the Act of May 12, 1933, Chapter 25, 48 Statutes, 73rd Congress, H R 3635 of the United States of America, and regulations issued thereunder by the Secretary of Agriculture on July 22, 1933, was void and invalid as to the said plaintiffs, and that the said National Agricultural Adjustment Act, the said regulations thereunder, the operations thereof and the enforcement thereof, declared void and invalid as to these plain-

tiffs; and that since the filing of said suit and at the instance of the said defendants, the Secretary of Agriculture, purporting to act under the authority of said National Agricultural Adjustment Act, instituted proceedings to terminate said License No. 17 as to the plaintiffs and each of them for alleged violations of said License, consisting of, among other things, the failure to make payments required by said License and specified in the Bill of Complaint on file herein, and thereafter revoked said License as to all licensees, issued a new license known as No. 57, purporting to license all distributors of milk in the said Los Angeles Sales Area, among whom are the plaintiffs, and thereafter revoked said License No. 57 as to the said plaintiffs and each of them because of such alleged violations. That since the filing of said Bill of Complaint as aforesaid, the defendants, Los Angeles Milk Industry Board and the individual defendants members thereof, and the defendant Milk Producers, Inc., has demanded from the plaintiffs and each of them further payments and sums of money, claiming the same under the terms of said License No. 17, and has threatened to proceed further to attempt to collect the same from said plaintiffs and each of them, and said Milk Producers, Inc., has brought suit in the Superior Court of the State of California, against the plaintiff, Lucerne Cream and Butter Company, a corporation, for such collection thereof, and threatens to bring similar suits against the other plaintiffs and each of them, for such collection. That the said defendant, H. C. Darger, is the Market Administrator appointed by said Secretary of Agriculture under said License No. 57, and has made

demands upon the plaintiffs and each of them for payments of various sums of money under the terms and provisions of said License No. 57. That the defendant, Anders Larsen, is the Enforcement Officer of the Agricultural Adjustment Administration of the United States Department of Agriculture, appointed as such by the Secretary of Agriculture, and claims the right and power of enforcement of the provisions of said Licenses No. 17 and No. 57. That the said defendant, Peirson M. Hall, is the duly appointed, qualified and acting United States District Attorney for the Southern District of California, and the person designated by the terms and provisions of the Agricultural Adjustment Act to institute proceedings to enforce the remedies and collect the forfeitures provided for or pursuant to said Act. That each of the plaintiffs was, on and prior to July 28, 1934, engaged in the business of distributing, marketing and handling milk and cream as a distributor in the Los Angeles Sales Area; that some of the plaintiffs produced within the territory of the State of California, defined by said purported license as "Los Angeles Sales Area," a portion of the milk and cream distributed, marketed and handled by such plaintiff, and secured all other portions of the milk and cream which were distributed, marketed or handled by such plaintiffs from farmers whose farms are located wholly within the State of California and in the territory therein included within said Los Angeles Sales Area; that no part of the milk or cream distributed, marketed or handled by any of the plaintiffs herein was sold or disposed of to persons residing outside the State of California, or to any person engaged in interstate

commerce, so that such products were transported or disposed of outside the State of California. That the persons from whom said plaintiffs purchased milk and cream, and the persons to whom said plaintiffs sold milk and cream, are satisfied with and desire to continue such business; that each of the plaintiffs desires to continue to engage in the business of distributing milk and cream in said Los Angeles Sales Area, and that cancellation and revocation of the licenses of plaintiffs, if enforced, will cause the assets of plaintiffs and each of them to be deteriorated, and the good will created by plaintiffs to be destroyed, and thereby plaintiffs and each of them will be irreparably injured; now, therefore,

It Is Ordered, Adjudged and Decreed, that the defendants, Los Angeles Milk Industry Board, Milk Producers, Inc., a California corporation, Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins, Ross Weaver, Anders Larsen, Enforcement Officer of the Agricultural Adjusment Administration of the United States Department of Agriculture for the Los Angeles Sales Area, H. C. Darger, Market Administrator under License No. 57, License for Milk, Los Angeles, California Sales Area, Peirson M. Hall, United States District Attorney for the Southern District of California, and Harry W. Berdie, Regional Representative of the Licensing and Enforcement Section of the Agricultural Adjustment Administration of the United

States Department of Agriculture, their agents, attorneys, successors and employees, be, and they and each of them are hereby enjoined and restrained, during the pendency of this action and until the final determination thereof, from:

(a) Making any of the demands and committing any of the acts with relation to the said plaintiffs hereinbefore mentioned or complained of in the Bill and Supplemental Bill of Complaint of plaintiffs, heretofore filed herein;

(b) In any manner interfering with plaintiffs or any of them in the conduct of their respective businesses, by any form of civil or criminal proceedings or otherwise;

(c) Enforcing or attempting to enforce as against the plaintiffs or any of them, any of the terms and provisions of Licenses No. 17 and No. 57, Licenses for Milk of the United States Department of Agriculture, Agricultural Adjustment Administration, Los Angeles Sales Area;

(d) Collecting or attempting to collect from plaintiffs or any of them, any of the sums of money demanded by defendants or any of them under the terms and provisions of said Licenses Nos. 17 and 57, either by civil or criminal proceedings or otherwise; or from commencing, prosecuting or maintaining any action against any of the defendants for the collection of any of said sums or from taking any action against said plaintiffs or any of them by any form of civil or criminal proceedings or otherwise, to enforce any penalty or penalties prescribed in the National Agricultural Adjust-

ment Act, or any rules or regulations purported to have been issued thereunder by the Secretary of Agriculture.

Done in open Court this 20th day of September, 1934.

GEO. COSGRAVE,
Judge.

Approved as to form:
FARRAND & SLOSSON,
E. H. WHITCOMBE,
By E. H. WHITCOMBE,
Attorneys for Defendants.

[Endorsed]: Filed Sept. 20, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 144-C, Equity

OBJECTIONS UNDER RULE 44 TO FORM OF PRELIMINARY INJUNCTION

COMES NOW defendants in the above entitled action by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, and object under Rule 44 to the form of the preliminary injunction as presented to them the 18th day of September for their approval under said Rule for the following reasons:

I.

Said preliminary injunction does not set forth the reasons for the issuance of the same.

II.

Said preliminary injunction is not specific in terms.

III.

Said preliminary injunction does not describe in reasonable detail the act or acts to be restrained.

DATED: September 19, 1934.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney.
Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

[Endorsed]: Filed Sept. 19, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 144-C Eq.

NOTICE OF MOTION TO DISSOLVE PRELIMINARY INJUNCTION.

To: Plaintiffs, CHARLES J. KURTZ, WESTERN HOLSTEIN FARMS, INC., VALLEY DAIRY, INC., and the LUCERNE CREAM AND BUTTER COMPANY; and LEWIS D. COLLINGS, EDWARD M. SELBY, and H. C. JOHNSTON, their attorneys.

Please take notice that on the 1st day of October, 1934, at two o'clock in the afternoon of said day or as soon thereafter as counsel can be heard, the defendants above named, will move the above court in the courtroom of Judge Cosgrave, in the Federal Building, Los Angeles, California, to dissolve the preliminary injunction heretofore granted against said defendants, and that said motion will be based on the records and files in this case,

three affidavits of E. W. Gaumnitz, which are filed herewith, hereby referred to and made a part hereof, and on oral testimony to be adduced on the hearing of said motion. Copy of said motion is hereunto attached and made a part hereof and contains the grounds upon which it will be made.

DATED: September 24th, 1934.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney.

Clyde Thomas,
CLYDE THOMAS,
Assistant United States Attorney.

[TITLE OF COURT AND CAUSE]

No. 144-C Eq.

MOTION TO DISSOLVE PRELIMINARY INJUNCTION.

NOW COME Harry W. Berdie, Los Angeles Milk Industry Board, Milk Producers, Inc., Richard Cronshey, William Corbett, David P. Howell, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins, Ross Weaver, Anders Larsen, H. C. Darger, and Peirson M. Hall, defendants in the above entitled cause and move the court to dissolve the preliminary injunction granted by it on the 20 day of September, 1934, on the grounds that:

I.

The bill of complaint and supplemental bill of complaint heretofore filed do not state a cause of action against these defendants, or any of them, for all the reasons set out in the motions to dismiss filed in the above entitled action, which motions to dismiss are hereby referred to and made a part hereof.

II.

Said plaintiffs, and each of them, are subject to the Agricultural Adjustment Act and the Milk License and all rules and regulations issued thereunder.

III.

Said temporary injunction was improperly issued and not in accordance with law for the following reasons:

(a) No security was required of plaintiffs or given by them as is necessary under Title 28, U. S. C. 382.

(b) Said temporary injunction does not comply with Title 28, U. S. C. 383, as it does not (1) set forth the reasons why it was issued; (2) Is not specific in its terms; (3) Does not describe in reasonable detail the act or acts sought to be restrained.

(c) Said temporary injunction attempts to restrain executive officers in the exercise of discretionary duties which is not within the power of this court.

(d) Said injunction was improvidently issued as the equities of the case preponderate in favor of the defendants. The possibility of damage or injury, which plaintiffs allege in their complaint that they anticipate, is greatly out-weighed by the injury that will be done to the entire industry, and the efforts of the Administration to benefit such industry in its entirety, by a declaration of

this court that such acts are unconstitutional, even before the trial is heard and contrary to the strong presumption of constitutionality of an act of Congress and of actions of executive officers of the Government.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney.

Clyde Thomas,
CLYDE THOMAS,
Assistant United States Attorney.

[Endorsed]: Filed Sept. 25, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

IN EQUITY
No. 144-C

NOTICE OF MOTION TO DISMISS PROCEEDINGS

To the plaintiffs, Charles J. Kurtz, Western Holstein Farms, Inc., Valley Dairy Company, Inc., Lucerne Cream and Butter Company, Inc., and to Lewis D. Collings, Edward M. Selby, and Harold C. Johnston, Attorneys.

You, and each of you, will please take notice that the Defendants Harry W. Berdie, Los Angeles Milk Industry Board, Milk Producers, Inc., Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. O. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Beuchert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H.

Brice, T. M. Erwin, A. R. Read, R. C. Perkins, Ross Weaver, Anders Larsen, H. C. Darger, Peirson M. Hall, will move the above entitled court at the court room of Judge George Cosgrave, in the Federal Building, Los Angeles, California, on the 1st day of October, 1934, at the hour of 2 o'clock in the afternoon or as soon thereafter as the counsel can be heard for an order to dismiss the above entitled proceedings.

Said motion will be based on the pleadings, records, and files in the above entitled action and all thereof, and on the affidavits of Anders Larsen attached to said motion and made a part thereof and on oral testimony to be adduced at said hearing, upon the grounds stated in said motion a copy of which motion is herewith served upon you.

Dated:—September 24, 1934.

Peirson M. Hall,
PEIRSON M. HALL,
U. S. Attorney

Clyde Thomas,
CLYDE THOMAS,
Assistant U. S. Attorney

[TITLE OF COURT AND CAUSE]

IN EQUITY

No. 144-C

MOTION TO DISMISS PROCEEDINGS

Come now the defendants, Harry W. Berdie, Los Angeles Milk Industry Board, Milk Producers, Inc., Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. W. Day, W. H. Stabler, Max Buechert,

C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice T. M. Erwin, A. R. Read, R. C. Perkins, Ross Weaver, Anders Larsen, H. C. Darger, Peirson M. Hall, by Peirson M. Hall, United States Attorney in and for the Southern District of California, and Clyde Thomas, Assistant United States Attorney in and for said District and State, move the court to dismiss the Bill of Complaint and Supplemental Bill of Complaint in this cause upon each and all of the following grounds:

I.

That it does not state a cause of action over which a court of equity has any jurisdiction whatsoever.

II.

That it does not allege any facts from which it appears that the plaintiffs, or either of them, will suffer irreparable injury if the injunctions prayed for in the bill of complaint are not granted; on the contrary, it affirmatively appears from the bill of complaint that the plaintiffs are in no danger of suffering any immediate and irreparable injury whatever if the injunction prayed for *are* not granted, in that:

(a) It does not allege any facts from which it appears that the plaintiffs, or either of them, will be subjected to a multiplicity of suits.

(b) It does not allege any facts from which it appears that the business and good will of the plaintiffs, or either of them, will be injured by the refusal of others to deal with the plaintiffs.

(c) It does not allege any facts entitling plaintiffs to join as plaintiffs but to the contrary is drawn on the

theory that the business of the various plaintiffs if not subject to regulations under the interstate commerce clause which, if it were a correct theory, would require that the business of each plaintiff be tried separately.

III.

The bill of complaint fails to allege that the plaintiffs, or either of them, have exhausted the administrative remedies specifically afforded them by Section 218, Article 2, General Regulations, Series 3, promulgated by the Secretary of Agriculture and approved by the President of the United States, in that plaintiffs make no showing of having made an application to the Secretary for reinstatement under the License, and fails to allege any excuse for the failure of the plaintiffs to exhaust said administrative remedies. Therefore, plaintiffs' suit is premature.

IV.

That it does not allege any facts from which it appears that the Agricultural Adjustment Act or any part thereof or License No. 17 or License No. 57, Los Angeles Milk Area or the rules and regulations are in any respect unconstitutional or void. Nor does it allege any facts from which it appears that the application of said Act of said Licenses to the business of the plaintiffs, or either of them, is in any respect unauthorized or unconstitutional.

(a) It affirmatively appears that said licenses and each of them is reasonable, and neither of them deprives the plaintiffs, or either of them, of property without due process of law.

(b) It affirmatively appears from the provisions of said License that it is a proper and constitutional exer-

cise of the power of Federal Government to regulate commerce among the States.

(c) The Bill of Complaint does not allege any fact from which it appears that the plaintiffs, or either of them, are engaged in shipping milk products to and from the State of California in the current of interstate or foreign commerce.

(d) The Bill of Complaint does not allege any facts from which it appears that said Agricultural Adjustment Act or any part thereof is unconstitutional because it unlawfully delegates legislative or judicial authority to an executive officer.

V.

That the Secretary of Agriculture has not been made a party to said action and he is a necessary and indispensable party for the determination of said suit as he is the administrative official who issued the license to the plaintiffs and he is the only one who can revoke or modify it and, in fact, the only official who has any authority in the administration of the Agricultural Adjustment Act, and all defendants named are merely subordinates performing duties under the direction of and for the said Secretary of Agriculture.

VI.

That it appears from said bill of complaint that the defendants and each of them is engaged in the administration of an Act of Congress and are acting under the orders of the Secretary of Agriculture and that all acts of said defendants and said Secretary of Agriculture are discretionary and not within the power of this court to enjoin.

VII.

That it appears from the Bill of Complaint, the Supplemental Bill of Complaint, and the files of this case that the plaintiffs and each of them in compliance with certain provisions of said licenses deducted and retained a large amount of money from the producers from whom they and each of them purchased milk, but continue to retain and have failed and refused to pay said money to the agency specified in said licenses for distribution to those for whose benefit such deductions were made and that plaintiffs or any of them do not come into equity with clean hands but having taken the benefits of said licenses are and each of them is estopped from denying the legality of said license and of the laws, rules and regulations authorizing its issuance.

VIII.

That an injunction to restrain a suit in the State Courts of the State of California is specifically prohibited by Section 379 U. S. C. Title 28.

WHEREFORE, these defendants pray that said bill of complaint and said supplemental bill be dismissed and that they recover their cost herein.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney.

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

[Endorsed]: Filed Sept. 25, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

At a stated term, to wit: The September Term, A.D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Monday, the 1st day of October, in the year of our Lord one thousand nine hundred and thirty-four.

Present: The Honorable Geo. Cosgrave, District Judge.

CHARLES J. KURTZ, et al.,

Plaintiffs,

vs.

HARRY W. BERDIE, et al.,

Defendants.

No. Eq.-144-C.

This cause coming on for hearing on Motion of Harry W. Berdie, Los Angeles Milk Industry Board, Milk Producers, Inc., Richard Cronshey, Wm. Corbett, David P. Howells, Geo. A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, Geo. E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins, Ross Weaver, Anders Larsen, H. C. Darger, Peirson M. Hall to Dismiss the above entitled proceedings, pursuant to Notice filed September 25th, 1934; Lewis D. Collings, Edw. M. Selby and H. C. Johnston, Esqs., appearing for the plaintiffs, and Peirson M. Hall, U. S. Attorney, and Clyde Thomas, Assistant U. S. Attorney, appearing for the defendants, said Motion is denied and an exception noted.

This cause also coming on, at this time, for hearing on Motion of the defendants to Dissolve Preliminary Injunction, pursuant to Notice filed September 25th, 1934; the said Lewis D. Collings, Edw. M. Selby and H. C. Johnston, Esqs., appearing, as aforesaid, the said Edw. M. Selby and the said Peirson M. Hall, Esqs., argue to the Court, Peirson M. Hall, Esq., argues to the Court and moves for permission to amend Motion to Dismiss on page 3, line 4, which Motion is granted, following which Edw. M. Selby, Esq., argues to the Court and Leonard Slosson, Esq., thereupon joins in said Motion of Peirson M. Hall, Esq., whereupon the said H. C. Johnston, Esq., argues to the Court, Lewis D. Collings, Esq., makes a statement, Peirson M. Hall makes a further statement, the Court makes a statement, and J. W. LaPointe being present as the official stenographic reporter of the testimony and the proceedings, the Court rders: Relative to the Motion of defendants to Dissolvc the Preliminary Injunction, counsel for the plaintiffs are ordered to prepare an Order to this effect; that the Restraining Order be continued in force and effect on the condition that within ten (10) days the money that the plaintiffs withhold from their producers by reason of the milk license, or rather, the operation of the milk license, be deposited in court with full detail as to the persons, the amounts and the dates.

At a stated term, to wit: The September Term, A.D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday, the

3rd day of October, in the year of our Lord one thousand nine hundred and thirty-four.

Present: The Honorable Geo. Cosgrave, District Judge.

[Title of Court and Cause]

In Equity, No. 144-C

This cause having come before the Court on January 22nd, 1934, for hearing on Motion of defendant W. J. Kuhrt, for himself alone and severing from his co-defendants, appearing specially, to vacate or dissolve the Temporary Restraining Order issued by this Court on January 15th, 1934, pursuant to Notice of Motion filed January 19th, 1934; and the Court having heard the argument of counsel herein, ordered said Motion stand submitted, and the Court having thereupon duly considered the same and being now fully advised in the premises, ordered as follows, to-wit:

Motion of defendants to dismiss plaintiffs' supplemental bill of complaint and to vacate the temporary restraining order heretofore issued is denied. Exception to defendants.

It is further ordered that within ten days after the date of this order plaintiffs deposit with the Clerk of this court that portion of the price of the milk purchased by them from any of the producers other than plaintiffs themselves, which, under the terms of the license they were required to deduct and pay to the administrators of the Milk License in the Los Angeles Area.

They shall within said time prepare and file with the Clerk of this court a statement designating the several sellers of milk from whom such payment has been withheld, together with the amount withheld from each.

COPY

[TITLE OF COURT AND CAUSE]

In Equity No. 444-C.

ORDER CORRECTING AND AMENDING MINUTE ORDER OF OCTOBER 3, 1934.

COSGRAVE, District Judge.

It is hereby ordered that the Order heretofore made and entered under date of October 3, 1934 in the above matter, is hereby corrected and amended as follows:

Motion of defendants to dismiss plaintiffs' supplemental bill of complaint and to vacate the temporary injunction heretofore issued is denied. Exception as to defendants.

It is further ordered that within ten (10) days from October 3rd, 1934 plaintiffs individually shall deposit with the Clerk of this Court that portion, if any, of the price of the milk purchased from any producer, other than plaintiffs themselves, which they are now withholding as deductions of any kind or nature pursuant to any orders or demands of the Administrators of the Milk Licenses in the Los Angeles Area.

They shall within said time prepare and file with the Clerk of this Court statements from or designating the several producers or sellers of milk, from whom any such payments have been withheld, together with the amount withheld from each.

Done in open Court this 10th day of October, 1934.

GEO. COSGRAVE,
District Judge.

Approved as to form:

CLYDE THOMAS,
Asst. U. S. Atty.,
Attorneys for Defendants.

[Endorsed]: Filed Oct 10, 1934 R. S. Zimmerman, Clerk. By Frances E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

CHARLES J. KURTZ, ET AL.
Plaintiffs,

vs.

HARRY W. BERDIE, ET AL.,
Defendants.

IN EQUITY
No. 144-C.

PETITION FOR APPEAL

The defendants Harry W. Berdie, Los Angeles Milk Industry Board, Milk Producers, Inc., a California cor-

poration, Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins, Ross Weaver, Anders Larsen, H. *D.* Darger and Peirson M. Hall, as United States District Attorney for the Southern District of California, conceiving themselves aggrieved by the order and decree made and entered in the above entitled cause on September 20, 1934, granting plaintiffs' motion for a preliminary injunction, as well as by a prior order of September 7, 1934, overruling their motions objecting to the filing of the supplemental bill of complaint and moving to dismiss the proceeding, and by the order and decree of October 2, 1934, overruling defendants' motions to vacate and dissolve the preliminary injunction and to dismiss the proceeding, hereby appeal from said orders and decrees of September 20, 1934, and October 2, 1934, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith; and the defendants in open court and during the same term at which the orders and decrees were rendered pray that this appeal be allowed and that a transcript of the record, proceedings, and papers upon which said orders and decrees were made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

It is further prayed that this appeal may be allowed without the giving of a cost bond, this being a case

brought up by the United States of America and by direction of the Attorney General thereof.

This 17th day of October, 1934.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney for the Southern District of California.

CLYDE THOMAS,
Asst. U. S. Atty.

Mac Asbill,
MAC ASBILL,
Special Assistant to the Attorney General.

E. H. Whitcombe
E. H. WHITCOMBE
Ferrand & Slosson
FERRAND & SLOSSON
Attorneys for Defendants.

[Endorsed]: Filed Oct 17, 1934 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

IN EQUITY
No. 144-C

ASSIGNMENT OF ERRORS

Come now the defendants, Harry W. Berdie; Los Angeles Milk Industry Board, Milk Producers, Inc., a California corporation; Richard Cronshey; William Corbett; David P. Howells; George A. Cameron; F. A. Lucas; Earl Maharg; A. G. Marcus; M. H. Adamson;

T. E. Day; W. H. Stabler; Max Buechert; C. W. Hibbert; W. J. Kuhrt; George E. Platt; A. M. McOmie; T. H. Brice; T. M. Erwin; A. R. Read R. C. Perkins; Ross Weaver; Anders Larson; H. C. Darger; and Peirson M. Hall, as United States District Attorney for the Southern District of California, and respectfully submit the following joint assignment of errors upon which they will rely upon appeal from the order and decree of this Court granting a preliminary injunction entered in said cause on the 20th day of September, 1934, and from the order and decree entered on October 2, 1934, overruling motions to dissolve the preliminary injunction and to dismiss the proceeding:

1. The Court erred in allowing the filing of the supplemental bill of complaint over the objections of defendants and despite evidence showing that none of the plaintiffs were any longer engaged in the business of distributing milk within the Los Angeles sales area;

2. The Court erred in overruling defendants' motion to dismiss the proceeding for the reason that the original and supplemental bills set out no cause of action in equity;

3. The Court erred in overruling defendants' motions to dismiss the proceeding for the reason that the evidence showed that none of the plaintiffs were any longer engaged in the business of distributing milk within the Los Angeles sales area, and had not been so engaged since the date upon which their licenses were revoked; and hence could not be subject to any danger of irreparable injury because of the revocation of their licenses;

4. The Court erred in entering a decree granting a preliminary injunction as sought in the original and supplemental bills of complaint;

5. The Court erred in overruling the objections of defendants to the form of preliminary injunction issued because said injunction does not set forth the reasons for its issuance and does not describe in reasonable detail the acts which it restrains;

6. In granting the preliminary injunction and in overruling the motion of defendants to dissolve same, the Court erred in holding that the general licenses issued by the Secretary of Agriculture and the Agricultural Adjustment Act, both under attack herein, were not valid regulations of the milk business conducted by plaintiffs within the Los Angeles sales area at the time their licenses were revoked;

7. In granting the preliminary injunction and in overruling the motion of defendants to dissolve same, the Court erred in holding that plaintiffs were not subject to the terms of the Agricultural Adjustment Act and bound by the provisions of the general licenses issued by the Secretary of Agriculture governing all distributors of milk operating within the Los Angeles sales area at the time that plaintiffs' licenses were revoked;

8. In granting the preliminary injunction and in overruling the motion of defendants to dissolve same, the Court erred for the reason that the evidence showed that plaintiffs were not engaged in the business of distributing milk in the Los Angeles sales area at the time said injunction was granted, and had not been so engaged since the date upon which their licenses were revoked;

9. In granting the preliminary injunction and in overruling the motion of defendants to dissolve same, the Court erred in holding that the original and supplemental

bills of complaint and the evidence made out a case warranting the exercise of equity jurisdiction by the Court;

10. In granting a preliminary injunction and in overruling the motion of defendants to dissolve same, the Court erred because defendants had no power to enforce penalties, fines or forfeitures of any kind against plaintiffs, or any of them, by virtue of the Los Angeles Milk License, the Agricultural Adjustment Act, the regulations promulgated by the Secretary and approved by the President under authority of said Act, or the order revoking plaintiffs' licenses because plaintiffs have not engaged in business as distributors of milk in the Los Angeles sales area since revocation of their licenses;

11. In granting the preliminary injunction as to all of the defendants except the defendant Peirson M. Hall, and in denying the motion of said defendants to dissolve the same, the Court erred because none of said defendants has any power to enforce the Los Angeles Milk License against plaintiffs or to enforce any penalties, fines or forfeitures against them, by virtue of said license or the Agricultural Adjustment Act;

12. In granting the preliminary injunction and in overruling the motion of defendants to dissolve same, the Court erred for the reason that none of the defendants were seeking to prosecute plaintiffs, or any of them, for engaging in business without a license;

13. In granting the preliminary injunction which stays proceedings in courts of the State of California, described in Paragraph XLVIII of the supplemental bill, the Court erred in that such injunction is specifically prohibited by Title 28, U. S. C. A., Section 379;

14. The Court erred in overruling the joint motion of all defendants to dismiss the proceeding for all the reasons contained in said motion filed after the issuance of the preliminary injunction.

15. The Court erred in granting the preliminary injunction and in overruling the motion of defendants to dissolve the same for the reason that no bond was required of the plaintiffs as required by Section 382, Title 28, U. S. C. A.

16. The Court erred in granting a preliminary injunction and overruling the motion of defendants to dissolve the same for the reason that plaintiffs are estopped to deny the validity of the Milk License and the Agricultural Adjustment Act by the fact that they retained and kept monies from producers as required by said license and have not accounted for the same and have not come into equity with clean hands for the same reason.

17. The Court erred in granting the preliminary injunction and in overruling the motion of defendants to dissolve the same and denying the motion to dismiss the bill and supplemental bill as to all defendants except the defendants Anders Larsen, H. C. Darger and Peirson M. Hall, for the reason that such other defendants operated only under License No. 17 which has been terminated, and had no authority or duties under License No. 57 which is now in effect.

18. That the Court erred in granting the preliminary injunction and overruling the motion of defendants to dissolve the same, and in denying the motion of defendants to dismiss for the reason that they had not exhausted their administrative and legal remedies.

19. That the Court erred in rejecting and denying admission of the evidence offered by the defendants which offer was to prove by fifty-eight producers of milk that the plaintiffs had purchased milk from them in accordance with the provisions of the license, had paid the price fixed by the license therefor and deducted therefrom the sums of money required by said license to be deducted and retained for the purpose of paying the same to Milk Producers, Inc., or the Market Administrator, as also provided by said licenses.

WHEREFORE, defendants pray that the foregoing order and decree of preliminary injunction and the order and decree overruling the motion to dissolve the preliminary injunction be reversed and that the United States District Court for the Southern District of California, Central Division thereof, be directed to proceed as the equity of the case shall require.

Peirson M Hall .
PEIRSON M. HALL,
United States Attorney for the Southern District of California.

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney, Southern District of California.

Mac Asbill
MAC ASBILL,
Special Assistant to the Attorney General.

E. H. Whitcombe
E. H. WHITCOMBE
Ferrand & Slosson
FERRAND & SLOSSON
Attorneys for Defendants.

[Endorsed]: Filed Oct. 17, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy.

[Title of Court and Cause]

In Equity No. 144-C

ORDER ALLOWING APPEAL

The petition of the defendants Harry W. Berdie, Los Angeles Milk Industry Board, Milk Producers, Inc., a California corporation, Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins, Ross Weaver, Anders Larsen, H. C. Darger and Peirson M. Hall, as United States District Attorney for the Southern Distract of California, praying an appeal from the order and decree of preliminary injunction granted in favor of plaintiffs herein, and from the order and decree overruling the motions to vacate the preliminary injunction and to dismiss the proceeding being now presented in open court and during the term said orders and decrees were entered, together with their assignment of errors, it is hereby ordered that said papers be filed, and it is further ordered:

1. That the appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit as prayed, and that the transcript of such parts of the record and proceeding herein, as the parties may by praecipe duly designate, be transmitted, duly authenticated, to said

United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, in the manner provided by law.

2. That no cost bond be required, it appearing that this appeal is brought up by the United States and by the direction of the Attorney General thereof.

3. That a citation be issued admonishing plaintiffs to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit on or before thirty days from the date of this order.

4. Application of defendants for an order of supersedeas of the preliminary injunction is denied.

GEO. COSGRAVE
United States District Judge.

October 18, 1934.

[Endorsed]: Filed Oct. 18, 1934 R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

In Equity No. 144-C

NARRATIVE STATEMENT OF THE EVIDENCE

A. Evidence for Plaintiffs

Plaintiffs introduced in evidence the verified original and supplemental bills of complaint. Both complaints are part of the record herein, are included in the praecipe and are by reference made a part hereof without restating their contents.

(Testimony of Geo. O. Stoddard)

GEO. O. STODDARD, being duly sworn, testified by affidavits as *as* follows:

I am now and at all times herein mentioned was the duly elected, qualified and acting Secretary of Western Holstein Farms, Inc., a corporation, one of the Plaintiffs herein. I have read the affidavits of W. J. Kuhrt, O. R. Fuller and Earl Maharg attached to the motion to dismiss proceedings and the motion to vacate or dissolve temporary restraining order filed herein. It is not true that the said Western Holstein Farms, Inc., has sold, assigned and/or transferred all of its business and assets as set forth in said affidavits; but the truth is that said plaintiff, Western Holstein Farms, Inc., has only relinquished and transferred that portion of its business having to do with the distribution of fluid milk within that territory known and described as the "Los Angeles Sales Area" in the purported licenses attached to plaintiffs' original and supplemental complaint herein, and over which territory and business the defendants are assuming the power of control and direction, as is more fully set forth in said complaints.

The transfer of such portion of the business of said plaintiff Western Holstein Farms, Inc., was on account of its fear of prosecution and of the excessive and prohibitive penalties provided for in such licenses, and the said Agricultural Act, as is more fully set forth in the complaints herein.

Said plaintiff Western Holstein Farms, Inc., intends to and will return to the business of distributing milk for human consumption within said Los Angeles Sales Area

(Testimony of Geo. O. Stoddard)

when it can safely do so without the threat of the penalties and prosecution hereinbefore mentioned.

That he is the duly elected, qualified and acting secretary of Palo Verde Creamery, Inc., a corporation.

That said corporation is separate and distinct from the Western Holstein Farms, Inc., and that neither owns any stock whatsoever in the other, and they do not own any property in common with each other, and have many separate and distinct stockholders.

That he has read the affidavit of Anders Larsen, filed with and attached to the motion to dismiss proceedings, and the facts set forth therein upon information and belief are untrue.

That Western Holstein Farms, Inc. do not sell, transport, and/or deliver any milk or dairy products of any kind or character whatsoever within the State of Arizona or any place outside the State of California.

That said Western Holstein Farms, Inc. sells its surplus milk and cream to Palo Verde Creamery, Inc. and that such milk and cream so sold by Western Holstein Farms, Inc. to Palo Verde Creamery Inc. is converted by said Palo Verde Creamery Inc. into butter and is not used for any other purpose.

That Palo Verde Creamery Inc. owns and operates a creamery at Blythe, California, and that it produces milk from its own herds located at Blythe, California.

That said Blythe, California, is not within the boundaries of the Los Angeles Milk Shed or within the Los Angeles Sales Area.

(Testimony of Geo. O. Stoddard)

That no milk sent by Western Holstein Farms, Inc. from Los Angeles or from the Los Angeles Sales Area or Los Angeles Milk Shed to Blythe, California, is bottled or used for any purpose other than butter.

That no milk, cream, or other dairy products are sold or transported by either corporation outside of the State of California.

That said Palo Verde Creamery Inc. at Blythe, California, sells milk, cream, butter and other dairy products to one P. E. Woodson, but that all of said milk, cream, butter and other dairy products are sold to the said P. E. Woodson at the creamery of the said Palo Verde Creamery Inc. at Blythe, California, and are delivered to said P. E. Woodson at said place and not otherwise.

That neither corporation has a permit or license to do business within the State of Arizona and does not transact any business within the State of Arizona.

That said Palo Verde Creamery Inc. is not a subsidiary in law or in fact of Western Holstein Farms, Inc.

That Western Truck Lines Ltd. of Los Angeles, California, is not in the habit of nor does it transport any milk, cream, or other dairy products for either of said companies into the State of Arizona or to any point outside the State of California.

That said Western Holstein Farms, Inc. does not have in its possession any monies deducted from producers who sold milk to them in accordance with or under the provisions of either license No. 17 or No. 57, and that said corporation has not collected from any producer any money in the form of deductions.

(Testimony of Charles J. Kurtz)

CHARLES J. KURTZ, being duly sworn, testified by affidavit as follows:

I am one of the plaintiffs in the above-entitled and numbered cause. I have read the affidavits of W. J. Kuhrt, O. R. Fuller and Earl Maharg attached to the motion to dismiss proceedings and the motion to vacate or dissolve temporary restraining order filed herein. It is not true that I have sold, assigned and/or transferred all of my business and assets as set forth in said affidavits, but have only relinquished and transferred that portion of my business having to do with the distribution of fluid milk within that territory known and described as the "Los Angeles Sales Area" in the purported licenses attached to plaintiffs' original and supplemental complaint herein, and over which territory and business the defendants are assuming the power of control and direction, as is more fully set forth in said complaint.

The transfer of such portion of my business was on account of my fear of prosecution and of the excessive and prohibitive penalties provided for in such licenses, and the said Agricultural Act, as is more fully set forth in the complaints herein.

I intend to and will return to the business of distributing whole milk for human consumption within said Los Angeles Sales Area when I can safely do so without the threat or intimidation of the penalties and prosecution hereinbefore mentioned.

That the statements made in the affidavits of Anders Larsen as to the deductions and withholding of moneys

(Testimony of Charles J. Kurtz)

from producers by said Charles J. Kurtz are wholly untrue and that he has not deducted nor withheld any money from producers of milk in accordance with said license or either of them, and has no such money in his possession.

(Testimony of Drummond Wilde)

DRUMMOND WILDE, being duly sworn, testified by affidavit as follows:

I am the Vice President of THE LUCERNE CREAM AND BUTTER COMPANY, a California corporation, one of the plaintiffs in the above-entitled action. It is not true that the said plaintiff company has at any time transferred all of its assets to other individuals or other corporations. The Lucerne Cream and Butter Company did, upon receiving notice of the Order of the Secretary of Agriculture revoking its license to engage in the business of distributing, marketing, or handling milk or cream as a distributor in the Los Angeles Sales Area, sell a portion of its equipment which was located in the City of Los Angeles, California. This was solely because of the threat and menace of a fine up to $1000.00 per day as provided by the Agricultural Adjustment Act for engaging in business without a license and to which said Lucerne Cream and Butter Company would be liable in the event that its claim that Milk License No. 17 and Milk License No. 57 are void should not be sustained by the courts. Said plaintiff company has not engaged in the business of distributing, marketing or handling milk

(Testimony of Drummond Wilde)

or cream as a distributor in the Los Angeles Sales Area since the 28th day of July, 1934, but is engaged in the business of distributing, marketing and handling milk and cream at other places in the state of California and desires to and intends to engage in the business of distributing, marketing and handling milk and cream as a distributor in the Los Angeles Sales Area, and will again engage in said business as soon as the menace and threat of said unreasonable penalty and fine has been removed. The summons and complaint in the action referred to in plaintiff's supplemental bill of complaing herein is an action commenced in the Superior Court of the State of California, in and for the County of Los Angeles by Milk Producers, Inc., one of the defendants herein against said The Lucerne Cream and Butter Company, was served upon said company on the 2nd day of August, 1934, and subsequent to the time it ceased to distribute milk or cream in the Los Angeles Sales Area. Said action is for the purpose of collecting from said plaintiff The Lucerne Cream and Butter Company moneys which Milk Producers, Inc. claims to be entitled to only by reason of the provisions of said License No. 17 and License No. 57, each of which is claimed by the plaintiffs herein to be void.

(Testimony of B. Fratkin)

B. FRATKIN, Being duly sworn, testified by affidavit as follows:

I am an officer, to wit the President, of Valley Dairy Company, Inc., one of the plaintiffs herein, and as such

(Testimony of B. Fratkin)

have full knowledge of the facts and matters hereinafter set forth. I have read the affidavits of W. J. Kuhrt, O. R. Fuller, and Earl Maharg filed herein upon the motions for an order vacating or dissolving the temporary restraining order heretofore issued herein and for an order dismissing the within proceedings, and more particularly those parts thereof referring to the sale and transfer of the assets of said Valley Dairy Co., Inc. It is not true that Valley Dairy Co., Inc. has sold, assigned or transferred all of its business and assets to other persons.

Following the issuance of the order of the Secretary of Agriculture on the 28th day of July, 1934, purporting to revoke License No. 57 as to the Valley Dairy Company, Inc., and purporting to take away the right of the said Valley Dairy Company, Inc. to engage in the business of distributing fluid milk within the Los Angeles Sales Area as defined by said license, said Valley Dairy Co., Inc. discontinued the business of distributing fluid milk within the said Los Angeles Sales Area and thereafter sold, assigned and transferred that portion of its assets theretofore used by it in the business of such distribution of fluid milk within the said Los Angeles Sales Area.

Said Valley Dairy Co., Inc., desired and still desires to continue to engage in the business of distributing fluid milk and cream in said Los Angeles Sales Area and only discontinued such business because of the act of said Secretary of Agriculture in so purporting to revoke said license, and because of the large penalty fixed by the

(Testimony of B. Fratkin)

provisions of the National Agricultural Adjustment Act for conducting such business without a license, to-wit, penalty of not exceeding $1000.00 per day for each day such business is so conducted.

The purpose of the within proceedings by the said plaintiff, Valley Dairy Company, Inc., is for the purpose of having the National Agricultural Adjustment Act and purported license No. 57, and the former purported license No. 17 heretofore issued by the Secretary of Agriculture, and the actions of the Secretary of Agriculture against this plaintiff as set forth in Supplemental Bill of Complaint filed herein, declared unconstitutional and void and not applicable to the said plaintiff, Valley Dairy Co., Inc.

It is the intention of said Valley Dairy Co., Inc., to continue and re-engage in the business of distributing fluid milk in the event its contentions as set forth in the within action and in the original Bill and Supplemental Bill filed herein are upheld by this court, and it if freed from the threat of such excessive and oppressive penalty as hereinbefore set forth.

In addition to the assets so sold, assigned and transferred as aforesaid, the Valley Dairy Co., Inc. has other assets, and at all times has been and now is engaged in other branches of the dairy business and the distribution of so-called dairy products, and the said Valley Dairy Co., Inc. has no intention of discontinuing other business or of disposing of its other assets or any of them.

That subsequent to the issuance of License No. 17, on November 30, 1933, said Valley Dairy Company, Inc.,

(Testimony of B. Fratkin)

was instructed by its shippers, with the exception of one W. F. Eldridge, not to pay any monies to Los Angeles Milk Industry Board, or Milk Producers, Inc. in accordance with the demands thereafter and subsequent to December 1, 1933, made by said Board and Corporation; that following the issuance of License No. 57, said Valley Dairy Company, Inc., was instructed by its shippers not to make any payments to H. C. Darger, Market Administrator, in accordance with the demands made by said H. C. Darger and said Valley Dairy Company, Inc., and has not paid any monies whatsoever to said Los Angeles Milk Industry Board, said Milk Producers, Inc., and said H. C. Darger, under the terms of License No. 17 or No. 57.

That said Valley Dairy Company, Inc., has paid each and every one of its shippers during the periods subsequent to November 20, 1933, and to and including May 31, 1934, and from June 1, 1934, to July 28, 1934, on account of milk sold by said shippers to said Valley Dairy Company, Inc., the price fixed by said Los Angeles Milk Industry Board and Milk Producers, Inc., under License No. 17, and thereafter by said H. C. Darger under License No. 57, and has accumulated and held the payments claimed to be due by said Los Angeles Milk Industry Board, said Milk Producers, Inc., and said H. C. Darger, and has not paid the same because of said instructions; that such payments and such accumulations were made by said Valley Dairy Company, Inc., upon the instructions of its attorneys and pending the final determination of the within action. That said Valley Dairy

(Testimony of B. Fratkin)

Company, Inc., did not pay such accumulations, or any portions thereof, to its said shippers because it might be liable to pay the same twice should the within action be determined adversely to its contentions and in favor of the validity of said Licenses Nos. 17 and 57 and affecting the business of said Valley Dairy Company, Inc.

(Testimony of C. L. Smith)

C. L. Smith, being duly sworn, testified by affidavit as follows:

I am the Plant Manager of the Los Angeles Plant of the Lucerne Cream and Butter Company, one of the plaintiffs in the above entitled action. It is not true that said plaintiff has at any time conducted its business in accordance with the provisions of Licenses Nos. 17 and 57 in that it paid to the producers the price fixed by said licenses less deductions provided under said licenses to be deducted and paid in accordance therewith to Milk Producers, Inc., the Milk Industry Board and the Market Administrator, but, on the contrary, said plaintiff did during all of said time, deny that said licenses, or either of them, were valid in any respect, and, as is shown in the Bill of Complaint and Supplemental Bill of Compaint herein, did during all of said time resist to the utmost the efforts of the defendants to enforce the provisions of said licenses. All milk which said plaintiff purchased from producers during said time was credited to the producer from whom purchased at the full prevailing price for milk at the time of purchase and pay-

(Testimony of C. L. Smith)

ments on account were made to such producers from time to time. That during said times, Milk Producers, Inc., and the Market Administrator, made demands upon the said plaintiff as set out in the Bill of Complaint and Supplemental Bill of Complaint and said plaintiff at all times refused to comply with said demands because of its belief that the same were unlawful and arbitrary and that said licenses were void. Each producer agreed with said plaintiff that the amount so demanded by said Market Administrator and Milk Producers, Inc., should remain to the credit of said producer until in this suit, or other litigation, there should be a final determination as to the validity of said demands made by defendants, and said plaintiff agreed with them that it would prosecute such litigation to such final determination. That said plaintiff has never received or accepted any benefits whatsoever under either of said licenses but on the contrary has expended large sums of money in defending what it believes to be the constitutional rights of plaintiffs herein and of the producers from whom plaintiffs purchased milk.

(Testimony of B. L. Brooks)

B. L. Brooks, being duly sworn, testified by affidavit as follows:

That he is and has been since 1931, the Manager of Palo Verde Creamery, Inc., located at Blythe, California; that he has read the affidavit of Anders Larsen filed herein with motion to dismiss proceedings and that the matters set forth therein on information and belief with

(Testimony of B. L. Brooks)

reference to the Palo Verde Creamery Company, the correct name of which is Palo Verde Creamery, Inc., are incorrect and untrue.

That Palo Verde Creamery, Inc., is not owned and/or operated as a subsidiary corporation by Western Holstein Farms, Inc., or by any other company.

That Western Holstein Farms, Inc., does not sell, transport, and/or deliver milk in the state of California, which is produced in Los Angeles, or any other place, through Palo Verde Creamery, Inc.

That Palo Verde Creamery, Inc., at Blythe, California, is not located at or within the Los Angeles Sales Area as there defined in licenses Nos. 17 and 57. That said Palo Verde Creamery, Inc., does not sell, transport, and/or deliver milk to any place in the state of Arizona. That said Palo Verde Creamery, Inc., sells milk to one P. E. Woodson but that all of such sales are made to P. E. Woodson, delivered to P. E. Woodson, or to others on the order of said P. E. Woodson, at the plant of Palo Verde Creamery, Inc., in Blythe, California, and no other place. That said Palo Verde Creamery, Inc., does not operate in any way within the state of Arizona and has no permit or license to do or transact business within the state of Arizona.

That all milk bottled or sold in bottles or cases by Palo Verde Creamery, Inc., at Blythe, California, is produced by Palo Verde Creamery, Inc., from its own dairy herds located at Blythe, California, and at no other place.

B. Evidence for Defendants

(Testimony of Harry W. Berdie)

HARRY W. BERDIE, being duly sworn, testified by affidavit as follows:

I am a defendant and am sued herein as Regional Representative of the Licensing and Enforcement Section of the Agricultural Adjustment Administration of the United States Department of Agriculture. I severed my connection with the said Agricultural Adjustment Administration of the United States Department of Agriculture on or about the 26th day of February, 1934, and have not been since that time and am not now connected with said Administration in any manner whatsoever, and hold no official position at all under said Administration or under the milk license issued for the Los Angeles area or any of its agencies.

(Testimony of W. J. Kuhrt)

W. J. KUHRT, being duly sworn, testified by affidavit as follows:

That he was and now is the Chairman of the Los Angeles Milk Industry Board; that said Board had certain duties and functions under License No. 17 as prescribed therein, but that said functions did not include the exercise of any right, power or authority to enforce in any way any of the provisions of said License, and no such authority has at any time been attempted to be exercised by either the witness or by said Board.

That the original Bill of Complaint in this aetion was filed on or about the 11th day of January, 1934, and that

(Testimony of W. J. Kuhrt)

on or about the 15th day of January, 1934, without notice of the same to this affiant or to said Board, and without the requirements of a bond, this Court issued a temporary restraining order purporting to restrain this affiant and said Board and all of the defendant members thereof from enforcing or attempting to enforce any of the provisions of said License. That thereafter and after due notice said temporary restraining order was vacated on or about the 30th day of January, 1934. That subsequent to the vacation of said temporary restraining order, and up to and including the 31st day of May, 1934, this affiant and said Board continued as they had theretofore done to perform the functions prescribed by said License, but that neither this affiant nor said Board has at any time interfered or attempted to interfere with the business or property of the plaintiff, nor have they enforced or attempted to enforce any of the terms or provisions of said License No. 17. Said License No. 17 was terminated by the Serretary of Agriculture as on the 1st day of June, 1934, and issued and made effective in lieu thereof License No. 57, which License is now in effect in the Los Angeles Milk Shed or Sales Area. That said License No. 57 contains no provisions for the administering thereof by the said Los Angeles Milk Industry Board, and that since said 1st day of June, 1934, neither this affiant nor said Board have administered or attempted to administer any provisions of said License.

That said Board is inactive and dormant and that it has and exercises no power or authority of any kind

(Testimony of W. J. Kuhrt)

other than that of closing its accounts and disposing of its assets in accordance with instructions from the Secretary of Agriculture, and that upon the conclusion of these activities the resignations of the members thereof will be accepted and said Board will pass out of existence.

That according to affiants information and belief, on or about the 20th day of July, 1934, and prior to the filing of the motion for leave to file a supplemental Bill of Complaint, and prior to the issuance of a temporary restraining order herein, each, every and all of the plaintiffs in this proceeding sold, assigned and transferred their businesses and assets to other persons, firms or corporations, as follows:

Charles J. Kurtz, doing business as Golden West Creamery Company, to Mary Kurtz; Western Holstein Farms, Inc., a corporation, to Palo Verde Creamery, Inc.; Valley Dairy Company, Inc., a corporation, to Billiwhack Stock Farms, Ltd., and Lucerne Cream & Butter Company, a corporation, to Modern Food Company; and that none of said plaintiffs is now engaged in business in the territory included within the provisions of any license relating to the Los Angeles Area.

That according to affiant's information and belief, each, every and all of said plaintiffs have funds in their possession accumulated in accordance with the provisions of License No. 17, in which they had no right, title nor interest, but that said funds properly belonged to Milk Producers, Inc., a corporation.

(Testimony of O. R. Fuller)

O. R. FULLER, being duly sworn, testified by affidavit as follows:

That he is the duly elected, qualified and acting President of Milk Producers, Inc., a co-operative marketing association or corporation, one of the defendants in the above entitled action.

That according to affiant's information and belief, that on or about the 9th day of August, 1934, plaintiffs in this action asked leave of Court to file a supplemental Bill of Complaint, and for an injunction against said Milk Producers, Inc. That on said date the Court issued a temporary restraining order purporting to restrain said corporation and other defendants from enforcing and/or attempting to enforce any of the provisions of Milk License No. 17 and 57.

That under and by the provisions of said License No. 17, from the 20th day of November, 1933, to and including the 31st day of May, 1934, Milk Producers, Inc., was charged with the performance of and performed certain functions, but that said functions did not include the exercise of any right, power or authority to enforce in any way any of the provisions of said Licenses, and that no such authority has at any time been attempted to be exercised by said corporation.

That effective on the 1st day of June, 1934, the Secretary of Agriculture terminated License No. 17 and issued License No. 57 in lieu thereof, which said License is now in effect in the Los Angeles Milk Shed or Sales Area.

(Testimony of O. R. Fuller)

License No. 57 contains no provision for the exercise or any functions in connection with the administration thereof by Milk Producers, Inc., and that said Corporation has no authority of any kind thereunder other than that it is permitted to engage in the business of purchasing, processing, manufacturing and distributing dairy products. That at no time since June 1st, 1934, has said corporation exercised or attempted or threatened to exercise any power or authority of any kind under said License other than that hereinbefore described. That upon affiant's information and belief, each, every and all of said plaintiffs have funds in their possession accumulated in accordance with the provisions of License No. 17, in which they have no right, title or interest, but that said funds properly belonged to Milk Producers, Inc.; and that on or about the 19th day of July, 1934, Milk Producers, Inc., filed in the Superior Court for the County of Los Angeles, an action to recover from the plaintiff Lucerne Cream & Butter Company, the amount of approximately Eighteen Thousand ($18,000.00) Dollars, being money had and received for the use and benefit of Milk Producers, Inc., and that said action is now pending but further prosecution thereof has been restrained by order of this Court.

That upon affiant's information and belief on or about the 28th day of July, 1934, the Secretary of Agriculture revoked the licenses under which all of the plaintiffs were engaged in the distribution of dairy products, and that on or about the 30th day of July, 1934, and prior to the filing of the motion for leave to file a supplemental

(Testimony of O. R. Fuller)

Bill of Complaint, and prior to the issuance of the temporary restraining order herein, each, every and all of the plaintiffs in this proceeding sold, assigned and transferred their businesses and assets to other persons, firms or corporations, and that none of said plaintiffs is now engaged in business in the territory included within the provisions of any licenses relating to the Los Angeles Area.

That by reason of the transfers of the businesses and assets of said plaintiffs, the continuance of the temporary restraining order issued herein may prevent further prosecution of said action against the plaintiff, Lucerne Cream & Butter Company, deprive the plaintiff in that action of its right to determination of the questions involved, and result in inability to collect the same if determined by said Superior Court to be due and payable.

(Testimony of Earl Maharg)

EARL MAHARG, being duly sworn, testified by affidavit as follows:

That he is the Secretary-Manager of California Milk Producers Association, a co-operative marketing association or corporation, a Director of Milk Producers, Inc., a member of the Los Angeles Milk Industry Board and one of the defendants in this action.

That he is familiar with the general nature and purposes of the proceedings relating to the dairy industry now pending before this Court and a certain action on the part of Milk Producers, Inc., against Lucerne Cream

(Testimony of Earl Maharg)

& Butter Company pending before the Superior Court in Los Angeles County, State of California, and that said action instituted by Milk Producers, Inc., in said Superior Court is designed solely for the purpose of attempting to recover monies withheld by said defendant from producers from whom it has purchased milk, and held by the defendant in said action for the use and benefit of Milk Producers, Inc. That said Superior Court action is not in any way an attempt to enforce the provisions of any licenses issued by the Secretary of Agriculture; that the complaint in said action is against Lucerne Cream & Butter Company and Safeway Stores, Inc., and the demands thereof are set out in paragraphs V and VI thereof, which reads as follows:

"V

"That within one year last past, and prior to commencement of this action, during the period from November 20, 1933, to May 31, 1934, in the City of Los Angeles, County of Los Angeles, State of California, the defendants, and each of them became indebted to the plaintiff in the sum of EIGHTEEN THOUSAND FOUR HUNDRED FIFTY FOUR AND ONE/100 ($18,454.01) DOLLARS for money had and received by the defendants, and each of them, to and for the use and benefit of the plaintiff.

VI.

That demand has been made upon the defendants, and each of them, for payment of said sum, but no part thereof has been paid, and there is now due, owing and unpaid from the defendants to the plain-

(Testimony of Earl Maharg)

tiff the sum of EIGHTEEN THOUSAND FOUR HUNDRED FIFTY FOUR AND ONE/100 ($18,545.01) DOLLARS."

That neither Milk Producers, Inc., nor the Los Angeles Milk Industry Board have or have had at any time any authority whatever to enforce any provisions of any license issued by the Secretary of Agriculture relating to the distribution of dairy products, nor have they or any member of said Board or any officer or director of said corporation enforced or attempted to enforce the same.

That as affiant is informed and believes, the financial obligations of the plaintiffs to Milk Producers, Inc., aggregate Fifty-two Thousand ($52,000.00) Dollars, and that each of said plaintiffs on or about the 30th day of July, 1934, transferred to other persons, firms or corporations, all of their assets and businesses without compliance with the provisions of Section 3440 of the Civil Code of the State of California; that in the case of at least one of the plaintiffs such transfer was made to a corporation domiciled outside of the State of California.

That any restraint upon Milk Producers, Inc., in its prosecution of the action against said plaintiff corporations, threatens to deprive Milk Producers, Inc., of certain funds to which they are rightfully entitled.

That under License No. 17 Milk Producers, Inc. and the Los Angeles Milk Industry Board were authorized to exercise certain administrative functions; that said license was terminated by the Secretary of Agriculture

(Testimony of Earl Maharg)

on May 31st, 1934; that effective June 1st, 1934, License No. 57 became effective. That in the provisions of License No. 57 neither said corporation nor said Board are authorized to exercise any power or authority whatever.

(Testimony of Anders Larsen)

ANDERS LARSEN, being first duly sworn, testified by affidavit as follows:

That he is one of the defendants named in the Supplemental Bill of Complaint; that he is now, and has been since the 21st day of January, 1934, the officer in Charge of the Los Angeles Office of the Field Investigation Section of the Agricultural Adjustment Administration, and that he has charge of investigation of violations of License No. 57 in the Los Angeles Area and that as such officer he and persons working under him are in constant and close association with milk producers in the Los Angeles Area as well as with milk distributors operating under said license; that he knows the plaintiffs to the above entitled action.

That he has received information from many persons, particularly, milk producers who sell their milk to each of the plaintiffs, and as to the manner in which said plaintiffs were conducting their business prior to the 30th day of July, 1934, that on information and belief derived from such sources, that the plaintiffs, at least three of them, up to and including the 28th day of July, 1934, conducted their business in accordance with the

(Testimony of Anders Larsen)

said licenses, Nos. 17 and 57, in that plaintiffs paid to the producers the price fixed by said licenses less deductions provided under said licenses to be deducted and paid in accordance therewith to the Milk Producers, Inc., the Milk Industry Board, and the Market Administrator. That further, on information and belief, the plaintiffs, at least three of them, still had in their possession practically all monies deducted from producers who sold milk to them, and each of them, in accordance with said licenses, and each of them, and have not paid the same to Milk Producers, Inc., the Milk Industry Board, or the Market Administrator.

That on information and belief, several producers from whom such money was withheld by said plaintiffs, consented thereto and did not object to such withholding but to the contrary, desired that the money be withheld and paid over to the Milk Producers, Inc., the Milk Industry Board and the Market Administrator.

That on information and belief, plaintiffs Western Holstein Farms, Inc., owns and operates a subsidiary corporation known as the Palo Verde Creamery Company; that through and in the name of said Palo Verde Creamery Company, Western Holstein Farms, Inc., sells, transports and delivers milk in the state of Arizona which is produced in the Los Angeles Sales Area; that said milk is transported by Western Truck Lines, Ltd., of Los Angeles, California, which company is in the habit of transporting milk for said Palo Verde Creamery Company and said plaintiff Western Holstein Farms, Inc., as far east as one-half way between Blythe, Cali-

(Testimony of Anders Larsen)

fornia, and Phoenix, Arizona; that butter is handled by the same parties in the same manner; that all such milk is from Los Angeles and is sent to Blythe, California, where it is bottled, and from which point it is distributed and at which place cream is used for churning butter. That distribution from the creamery at Blythe, California, is made to many points in Arizona, and among other customers supplied by said Palo Verde Creamery Company is one P. E. Woodson of Quartzsite, Arizona; that said P. E. Woodson furnished photostatic copies of statements rendered by Palo Verde Creamery Company to him for milk and butter and other products he had purchased from said Palo Verde Creamery; that said statements were rendered on billheads which contained the following printed matter:

"Palo Verde Creamery, Blythe, California."

and were all to P. E. Woodson, Quartzsite, and contained practically nothing but milk and butter and showed total purchases as follows:

Week ending Jan. 1, 1934	36.44
Month of Feb. 1, 1934	35.17
Month of Mar. 1, 1934	267.94
Month of April, 1, 1934	315.36
Month of May 1, 1934	305.35
Month of June 1, 1934	295.08
Week ending July 1, 1934	292.69

That on information and belief the Lucerne Cream and Butter Company is a subsidiary of the Safeway Stores, Inc., and wholly owned by them; that as such

(Testimony of Anders Larsen)

subsidiary, said plaintiff Lucerne Cream and Butter Company purchases butter and milk which is supplied to the many stores operated by said Safeway Stores, Inc., that in particular, said plaintiff during the year 1933, shipped from the state of Idaho to the city of Los Angeles, a total of 4,086,664 pounds of butter, and during the year 1934, shipped from the state of Idaho to Los Angeles, 2,209,056 pounds of butter, and that the Modern Food Company is the wholly owned subsidiary of said Safeway Stores, Inc., and to whom the said plaintiffs Lucerne Cream and Butter Company transferred its business after its license was revoked on the 28th day of July, 1934, and shipped into Los Angeles since said date a total of 364,350 pounds of butter from Idaho and 24,397 pounds from Denver, Colorado; That a schedule of car numbers, weight and freight bill numbers showing such shipment was supplied to the court which showed shipments beginning on December 31, 1932, to and including July 27, 1934, showing the total weights as above set out, and, further, a schedule of shipments made by the Modern Food Company beginning August 7, 1934, and ending September 7, 1934, showing the total weights as above set out.

(Testimony of M. P. Monson)

M. P. Monson, being duly sworn, testified by affidavit as follows:

That he is an Assistant Investigator for the Agricultural Adjustment Administration of the United States

(Testimony of M. P. Monson)

Department of Agriculture; that he has investigated the activities of the Lucerne Cream & Butter Company, one of the plaintiffs in the above entitled action, and on information and belief that said Lucerne Cream & Butter Company is a wholly owned subsidiary of Safeway Stores, Inc., a California corporation, which is in turn a wholly owned subsidiary of Safeway Stores, Inc., a Maryland corporation; that the information on which affiant testifies was secured from employees of said plaintiff and from other persons in similar industries and from credit reports and reputation generally.

That the said plaintiff, Lucerne Cream & Butter Company, operates generally as an acquiring and distributing subsidiary of Safeway Stores, Inc., for milk and its products, and that said operations consist of the purchase and distribution of whole milk, of the operation of creameries, the churning of butter, the canning of condensed milk and the distribution of said products to the various subsidiaries of said Safeway Stores, Inc., a Maryland corporation, to the number of about seventeen, and of the sale of the same to other wholesalers, retailers and consumers, and includes the transportation of said products in many cases from one state to another. The operations of said plaintiffs extend over the states of California, Nevada, Arizona, Oregon, Washington, Idaho and many others.

That the affiant learned that said plaintiff shipped large quantities of butter into Los Angeles from the State of Idaho, and checked the records of said shipments and made abstracts thereof as set forth in the tes-

(Testimony of M. P. Monson)

timony of Anders Larsen, and that such shipments were continued by said Lucerne Cream & Butter Company up to and including the 27th day of July, 1934. That on or about the 28th day of July, 1934, the license to said Lucerne Cream & Butter Company, issued by the Secretary of Agriculture, was cancelled by said Secretary, and that on and after said dates shipments of butter from the same source in Idaho were continued to the City of Los Angeles by the Modern Food Company, another subsidiary of said Safeway Stores, Inc.

That on further investigation of said Lucerne Cream & Butter Company affiant learned that it operated a creamery at Hanford, California, where evaporated milk is canned. That he visited said plant, watched the operations thereof and learned while there that three brands of evaporated milk were canned, and was informed by the plant Superintendent in said creamery that the said three brands, respectively, were disposed of in the following manner:

> "Maximum" brand is sold through the Safeway, Piggly Wiggly and Pay'N'Takit Stores.
>
> "McMarr" brand is sold in the stores operated by the McMarr Division.
>
> "Lucerne" brand is packed and distributed by the Western States Wholesale Grocery, and other wholesale units operating through the Safeway system for distribution to independent grocers who obtained their supplies through these cash and carry wholesale units operated by the Safeway system.

(Testimony of M. P. Monson)

That he is informed by said Superintendent in said plant it received from producers for the purpose of evaporating and canning a total of 120,000 pounds of milk daily, and from this milk 1,200 cases is canned each day.

The railroad records of shipments from said plant were checked and a schedule made thereof as to shipments made to points without the State of California; that according to such records said plaintiff has shipped to points without the State of California, over the Southern Pacific Railroad Company, from Hanford, California, a total of 3,094,799 pounds of canned milk, and that in addition thereto, according to information secured from said Superintendent, many shipments of canned milk were made to San Francisco for the United States Army for use at various points on the Pacific, including the Phillipine Islands, the Hawaiian Islands and other places, and that in addition thereto canned milk was shipped to San Diego and to the United States Naval Service and for the United States Marines, to be used by them at all points on the Pacific Coast, and that milk was also shipped to Safeway Stores operating in the Hawaiian Islands, and that none of such shipments were reflected in the schedule made from said Railroad records, as in all such shipments the Railroad records show a shipment to San Francisco and San Diego.

That in line with his duties affiant also investigated plaintiff Western Holstein Farms, Inc., and on examination of the State Corporation records found that there was also a Western Farms, Inc., and a Palo Verde Creamery, Inc., and that Palo Verde Creamery, Inc.,

(Testimony of M. P. Monson)

was the same corporation as Western Farms, Inc., the said Western Farms, Inc., having changed its name to Palo Verde Creamery, Inc.; he also found the Western Holstein Farms, Inc., and Western Farms, Inc., had the same directors and the same stock ownership. That the Western Holstein Farms, Inc., operated in Los Angeles, where it purchased and distributed whole milk and other operations incidental thereto, and that the Palo Verde Creamery, Inc., operates a creamery at Blythe, California; that he visited the creamery at Blythe and watched the delivery of milk thereto and found the same came from Western Holstein Farms, Inc., at Los Angeles, and was informed by the Manager of said Creamery that such was the case.

That he saw the milk being bottled in the creamery and observed that the bottles in which it was being placed were stamped with the name "Western Farms", which were the same bottles as used by the Western Holstein Farms, Inc., in Los Angeles, and that he was informed by said Manager of said creamery that he also churned butter from milk and from cream sent to him from Los Angeles. That large quantities of whole milk and butter were sent from the said creamery by the Palo Verde Creamery, Inc., to many points in the State of Arizona, including among others, Quartzsite, Arizona, at which place one P. E. Woodson was a regular customer and furnished affiant with receipted statements from Palo Verde Creamery, Inc., which were attached to the affidavit of Anders Larsen.

(Testimony of M. P. Monson)

That from investigation and observation, the operations at Los Angeles of Western Holstein Farms, Inc., and Western Farms, Inc., are conducted as by the same company or one operating unit, using the same equipment, the same trade names, the same bottles and cases and the same equipment for transportation between Blythe and Los Angeles.

(Testimony of Louis H. Decker)

Louis H. Decker, being duly sworn, testified by affidavit as follows:

That he lives at 11615 Lewis Street, Lynwood, California, and that at present operates a dairy at 12606 Bullis Road, near Lynwood, California, and has operated the same since April 19th, 1934. That the said dairy has consisted of seventy-four or seventy-five cows and that during all of said period the milk produced from said dairy has all been sold to Western Holstein Farms, Inc., and was being sold to it at the time he took over the management of said dairy, and on information and belief had been sold to said company for a long period prior thereto.

That since he has been managing said dairy said Western Holstein Farms, Inc., has accepted milk delivered to it as aforesaid, and has paid him for said milk by check, "On account Milk Shipments", and that affiant has asked said Western Holstein Farms, Inc., for an accounting as to the basis of said payments and has been informed orally of the manner in which said payments

(Testimony of Louis H. Decker)

were made, which in each instance was in accordance with the requirements of the Federal Milk License and so stated by them, and that such information was received from George O. Stoddard and B. A. Boyle.

That for part of the period covered he figured the amount of money paid to him as against the amount that should have been paid in accordance with the milk license, and found such payments in accordance with such license schedule, but that he has not computed such payments for the entire period since he has operated the dairy. That in accordance with his understanding, such payments were made after deducting and holding out monies required under the license to be retained and held out and paid over to the Milk Administrator or the person designated by him, and affiant accepted said payments on that basis.

That he, on the 5th day of July, 1934, in writing authorized said Western Holstein Farms, Inc., to make such deductions in accordance with said license, which authorization has at all times been and still is in effect.

That on or about the 21st day of June, 1934, plaintiff, Western Holstein Farms, Inc., through the truck driver collecting milk from affiant, delivered to affiant a letter in words and figures as follows:

"Los Angeles
3402 Avalon Blvd.,
June 21-1934.

L. H. Decker
Dear Sir,-

The Government Auditors are at our plant checking over our records for the purpose of establishing a fair

(Testimony of Louis H. Decker)

base for each of our shippers. With this thought in mind we should like to have you bring to the office today all of the information you have in regard to the replacement of cows or the purchase of new ones. We would like to know whether these cows were purchased from herds with established shipping rights or if they were purchased from herds which would constitute new production. This applies to the period from November 20th, 1933, to June 1st, 1934.

It will be very much to your advantage to get this information accurately and must be in our office today.

Yours truly,

WESTERN HOLSTEIN FARMS INC.,

BY (Signed) H. J. BOYLE"

and that immediately thereafter, affiant furnished Western Holstein Farms, Inc., the information requested in said letter.

(Testimony of E. W. Gaumnitz)

E. W. GAUMNITZ, being first duly sworn, testified by affidavit as follows:

I am Economic Adviser to the Dairy Section of the Argicultural Adjustment Administration and have knowledge of the facts hereinafter set forth.

My previous economic training and experience is as follows:

Graduated University of Minnesota, 1921, degree of B.S., and subsequently received degrees of M.A. and

(Testimony of E. W. Gaumnitz)

Ph.D.; Instructor and Assistant Professor of Agricultural Economics, University of Minnesota, 1921-1925; Agricultural Economist, Dairy Production, Iowa State College, 1925-1928; Agricultural Economist, California State Department of Agriculture, 1928-1930; Agricultural Economist, Market Research in Dairy Products, Bureau of Agricultural Economics, U. S. Department of Agriculture, 1930-1933; Economic Adviser, Dairy Section, Agricultural Adjustment Administration, since May, 1933.

I. Economic Status of Milk Producers as a Result of the Depression.

Throughout the country, a wide disparity exists between the prices received by farmers for dairy products, and the prices paid by said producers for commodities purchased. In July, 1934, the prices received by farmers for dairy products in terms of purchasing power were but 63 percent of the prices received for said products during the period August, 1909 to July, 1914 (the base period specified in the Agricultural Adjustment Act, pursuant to the provisions of which the Los Angeles License was formulated.)

The average farm prices per hundredweight in money (not purchasing power) received by California producers for milk sold at wholesale during the base period, August, 1909 to July, 1914, during the period 1929 to 1933, inclusive, and during the first seven months of 1934, respectively, were as follows:

(Testimony of E. W. Gaumnitz)

	California
Base Period (August, 1909 to July, 1914)	$1.81
1929	2.68
1930	2.48
1931	2.06
1932	1.66
1933	1.52
1934	
January	1.50
February	1.50
March	1.60
April	1.50
May	1.50
June	1.50
July	1.60
Average, seven months' period	1.53

The average dealer's buying prices in Los Angeles, f.o.b. city for Class I milk having an average butterfat content of 4.0 percent, during the period 1929 to 1933, inclusive, and during the first seven months of 1934, respectively, were as follows:

1929	$3.56
1930	3.38
1931	2.84
1932	2.09
1933	1.98
1934	
January	2.05
February	2.05
March	2.05

(Testimony of E. W. Gaumnitz)

April	2.05
May	2.05
June	2.21
July	2.21
Average first seven months of 1934	2.10

The following table indicates the gross income received by farmers for milk produced on farms in California, and in the United States, for the years 1929 and 1932, respectively.

	California	United States
1929	$107,427,000	$2,322,553,000
1932	69,395,000	1,260,424,000

The foregoing figures indicate a decline in gross income from milk between 1929 and 1932 of 35.4 percent in California, and 46 percent in the United States.

The decline in the income to the dairy farmer from his sale of milk has been caused in part by the widespread economic depression which has reduced the price which consumers were willing or able to pay for milk. The reduction in the demand for milk has led to unwarranted price cutting, extended price wars, and other methods of destructive competition among distributors. In the course of such price wars distributors reduced the price paid by them to the farmers for milk purchased below the point justified by the existing supply and demand situation. Such unwarranted price cutting, if continued, would ultimately result in a shortage of milk for fluid consumption, since some producers and distributors who were needed to supply the market with normal fluid milk requirements

(Testimony of E. W. Gaumnitz)

would be forced out of business. The practice of price cutting thus operates to the detriment of producers, distributors and consumers. The disastrous decline in the price received by farmers for milk has led to strikes and violence in numerous metropolitan milk sheds. Between June, 1933 and February, 1934 such producer strikes occurred in the states of Illinois, Connecticut, Pennsylvania and New York.

The issuance of the Los Angeles Milk License is part of a comprehensive, nation-wide plan being put into effect by the Secretary of Agriculture pursuant to the powers vested in him by the Agricultural Adjustment Act for the purpose of restoring the purchasing power of the dairy farmer by the gradual adjustment of such purchasing power to its pre-war level during the period 1909-1914. Licenses for milk similar to the Los Angeles License have been issued and are now in effect in the following forty important metropolitan areas: Chicago, Illinois; Alameda County, California; Philadelphia, Pennsylvania; Baltimore, Maryland; San Diego, California; Des Moines, Iowa; Minneapolis and St. Paul, Minnesota; Omaha, Nebraska and Council Bluffs, Iowa; Evansville, Indiana; St. Louis, Missouri; Boston, Massachusetts; Kansas City, Missouri and Kansas City, Kansas; Lincoln, Nebraska; Sioux City, Iowa; Wichita, Kansas; Indianapolis, Indiana; Providence, Rhode Island; Newport, Rhode Island; Fall River, Massachusetts; New Bedford, Massachusetts; Detroit, Michigan; Richmond, Virginia; Lexington, Kentucky; Leavenworth, Kansas; Quad Cities, Iowa and Illinois; Louisville, Kentucky; Oklahoma City, Oklahoma; Fort Wayne, Indiana; Tulsa, Oklahoma;

(Testimony of E. W. Gaumnitz)

Savannah, Georgia; and the following areas in Michigan: Ann Arbor, Battle Creek, Bay City, Flint, Grand Rapids, Kalamazoo, Lansing, Port Huron, Saginaw and Muskegon.

Additional licenses are now being formulated and will shortly be issued by the Secretary.

II. Relative Importance of the Dairy Farming Industry.

The following table indicates the proportion of the total cash income of farmers from farm production in California, and in the United States for the year 1932, represented by the cash income from milk production:

	California	United States
Total Cash Farm Income	$375,525,000	$4,199,447,000
Cash Farm Income from Dairy Products	65,484,000	985,099,000
Percent Cash Farm Income from Dairy Products is of Total Cash Farm Income	17.4	25.5

During the year 1931, the gross income of all farmers in the United States derived from the sale of dairy products was $1,614,394,000. This sum may be compared with the total value of products of the following industries during the same year:

Motor Vehicles (not including motorcycles)	$1,567,526,000
Steel Works and Rolling Mills	1,402,843,000
Lumber and Timber Products not elsewhere Classified	443,628,000

(Testimony of E. W. Gaumnitz)

III. The Parity Price.

The parity price (as defined in the Agricultural Adjustment Act) which California producers should have received in October, 1933 (the month before which the first license in question went into effect) for milk sold at wholesale was $2.13 per hundredweight.

This parity price is computed in the following manner: The average farm price of $1.81 received by California producers for milk sold at wholesale during the base period, August 1909 to July 1914, is adjusted: (1) by applying thereto the October 1933 index of prices paid by farmers for commodities bought, being 116 percent of the average of such prices during the base period, and (2) by applying to the resulting figure of $2.10 the index number of seasonal variation in prices, the October price being normally 1.3 percent above the average monthly price in California.

The parity price which California producers should have received in July, 1934, was $2.12 per hundredweight and is computed in a manner similar to that outlined above in regard to the October 1933 parity price.

These parity prices, so computed, are probably lower than the true parity prices for producers supplying the Los Angeles Sales Area, for two reasons: (a) sanitary regulations adopted since the base period have increased the relative cost of production and improved the quality of the commodity under consideration, thereby justifying a higher parity price; (b) the computation is based upon the prices to California producers generally, not merely to producers supplying the Los Angeles Sales Area, who

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presumably, by virtue of their location advantage, were receiving a higher price during the base period than farmers generally in the State of California.

The dealers' buying price at Los Angeles, f.o.b. city, for Class I milk testing 4.0 percent butterfat, when adjusted to parity levels as of October 1933, was $3.04 per hundredweight.

This parity price is computed in the following manner: The average base period (August 1909 to July 1914) dealers' buying price per hundredweight, f.o.b. city, for milk testing 4.0 percent butterfat is adjusted: (1) by applying thereto the October 1933 index of prices paid by farmers for commodities bought, being 116 percent of the average of such prices during the base period, and (2) by applying to the resulting figure of $3.00 the index of seasonal variation in prices of 101.3, the October price for this class of milk, being normally 1.3 percent above the average of such prices for the year.

The dealers' buying price for such milk when adjusted to parity levels as of July 1934 was $3.09 per hundredweight.

IV. Relationships Between the Prices Received by Farmers for Milk in Different Uses, and Inter-market Price Relationships of Milk Products.

A. Utilization of milk in the United States.

The milk produced in the United States is distributed among several uses, such as (1) milk for consumption as fluid milk, (2) milk for consumption as fluid cream,

(Testimony of E. W. Gaumnitz)

and (3) milk for conversion into and consumption as (a) butter, (b) cheese, (c) condensed and evaporated milk, (d) ice cream, (e) powdered milk and (f) etc.

The following figures indicate the volume of milk and the butterfat content of such milk utilized in specified manufactured products, and for consumption as milk in the United States during the year 1932.*

Product	1/ Whole Milk Used 1000 lbs.	2/ Fat in Milk Used 1000 lbs.
Factory product 2/		
Butter, creamery and whey	34,386,162	1,369,389
Cheese, American (whole and part skim)	3,801,107	136,534
Cheese, other than American, and cottage, pot and bakers'	1,082,352	36,667
Evaporated milk (whole)	3,611,101	132,361
Condensed milk (whole)	247,182	9,085
Ice cream (factory)	2,322,998	90,068
Powdered cream	1,553	61

1/ Based on the quantities of milk and cream reported as being received for use in these products. In addition, some fat remains in skim milk on farms, some is lost in spillage, stickage, etc. before being delivered, and some is excluded through rounding of fractional weights and tests upon delivery.

2/ These data differ in several respects from some published prior to November, 1932. The estimates of milk and butterfat required per pound of product are based chiefly on reports received for 1930 and 1931 showing quantities of milk and cream received by plants and the quantities of products made. Allowance has been made for duplication, principally in fat recovered from whey and in the use of such manufactured products as butter and evaporated or condensed milk in ice cream. It has been assumed that milk and cream used in ice cream made in homes and in small establishments not reporting as factories is included as consumption as fluid milk or cream.

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Powdered milk (whole)	90,808	3,479
Malted milk	35,069	1,346
Totals used for factory products	45,578,332	1,778,990
Butterfat from whey cream	340,436	13,599
Butterfat from butter, etc. used in ice cream	482,964	18,739
Net used for factory products	44,754,932	1,746,652
Milk used by nonfarm[3/] population	31,991,461	1,225,273

3/ The quantities shown exclude consumption by the urban farm population. The quantities of milk here shown as consumed are those indicated by reports from local Boards of Health. Current estimation of sales of milk and cream from farms and current estimates of milk production by cows not on farms, if confirmed by further study, would indicate a lower level of milk consumption in the South, particularly in the South Atlantic States.

*Source: United States Department of Agriculture, Bureau of Agricultural Economics.

The following table indicates the proportion of the total milk used for fluid milk and for manufactured dairy products that was utilized in each product during the year 1932:

Product	Percentage of Total Milk Used in Each Product
Factory product	
Butter, creamery and whey	44.4
Cheese, American (whole and part skim)	5.0
Cheese, other than American, and cottage, pot and bakers	1.4
Evaporated milk (whole)	4.7
Condensed milk (whole)	.3

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Ice cream (factory)[1/]	2.4
Powdered cream	*
Powdered milk (whole)	.1
Malted milk	*
Net used for factory products[1/]	58.3
Milk used by non-farm population	41.7
Total	100.0

1/ Allowing for duplication resulting from inclusion of butterfat from whey cream used in butter and butterfat from butter, etc., used in ice cream.

*Less than one-tenth of one percent.

The demand for all milk is derived from the demand for milk in different uses. Milk is distributed among the different uses noted above, and the relative volume entering the various uses fluctuates according to changes in relative prices of the finished products engendered by changing demand conditions for the various products. Any activity that tends to establish and maintain normal relationships between prices of the various products and that tends to raise and maintain the price of butterfat in one or more of its major uses, also tends to stabilize prices received by producers for milk in all uses.

B. Production of specified dairy products in major producing states.

The milk utilized in the manner indicated in the foregoing table is produced and processed in highly concentrated producing areas. This fact becomes evident upon consideration of the volume of production of specified manufactured products which is produced in major producing states, indicated in the following tables.

(Testimony of E. W. Gaumnitz)

The following table indicates the proportion of the total United States production of creamery butter in 1932 that was produced in the major producing states of Iowa, Minnesota, Nebraska and Wisconsin:

State	Amount (pounds)	Percentage of U. S. Total
Iowa	219,531,000	13.0
Minnesota	281,659,000	16.6
Nebraska	85,660,000	5.1
Wisconsin	170,339,000	10.1
Total Four States	757,189,000	44.8
United States	1,694,132,000	100.0

*Source: U. S. Department of Agriculture, Bureau of Agricultural Economics, Division of Dairy and Poultry Products.

The foregoing figures indicate that 44.8 percent of the creamery butter manufactured in the United States was produced in the states of Iowa, Minnesota, Nebraska and Wisconsin.

The following table indicates the proportion of total production of cheese in the United States in the year 1932 that was produced in Wisconsin and New York:*

State	Amount (pounds)	Percentage of U. S. Total
Wisconsin	302,439	51.3
New York	78,161	13.3
United States	587,627	100.0

*Source: U. S. Department of Agriculture, Bureau of Agricultural Economics, Division of Dairy and Poultry Products.

The foregoing figures indicate that 64.8 percent of the cheese produced in the United States in 1932 was produced in the states of Wisconsin and New York.

(Testimony of E. W. Gaumnitz)

The following table indicates the production of evaporated milk in 1932 by specified states and the proportion such production was of total United States production of evaporated milk:*

State	Amount (1000 pounds)	Percentage of U. S Total
Wisconsin	629,641	40.1
New York	99,341	6.3
California	203,554	13.0
Illinois	87,260	5.6
Ohio	80,300	5.1
United States	1,570,612	100.0

*Source: U. S. Department of Agriculture, Bureau of Agricultural Economics, Division of Dairy and Poultry Products.

The foregoing figures indicate that the states of Wisconsin and California, produced 53.1 percent of the total evaporated milk produced in the United States in 1932.

Manufactured dairy products, to a lesser extent cream, and to a still lesser extent fluid milk, are readily storable and transportable. In the case of cream and manufactured products, this factor of storability and transportability is reflected in the free flow of these products between markets, whereas high transportation costs, engendered by the bulk and perishability of fluid milk, render it uneconomical to transport fluid milk long distances. The free flow of these products between markets results in inter-market price relationships of such nature that the prices of these products tend to vary between markets only by the amount of transportation

(Testimony of E. W. Gaumnitz)

costs from one market to the next, plus the necessary additional handling charges other than transportation. In addition to the foregoing, a considerable volume of dairy products, chiefly evaporated milk, is exported from the United States yearly, and a rather large volume of cheese, especially Swiss and Italian varieties, is imported yearly.

The above generalization are substantiated by a consideration of the (1) receipts of milk, cream, butter and other dairy products at specified markets, and (2) between prices in different markets.

C. Receipts of specified dairy products at the principal markets.

The following table indicates the receipts of cream at Chicago and the metropolitan area, by states of origin, for the year 1933:*

State	Receipts of Cream 40 Quart Units
Arkansas	6,518
Illinois	158,014
Indiana	19,296
Iowa	6,160
Kansas	122
Kentucky	8,320
Michigan	3,104
Mississippi	1
Missouri	26,382
Ohio	5,157
Oklahoma	180
Tennessee	248

Texas	2
Wisconsin	314,817
Total	548,323

*Source: United States Department of Agriculture, Bureau of Agricultural Economics.

The following table indicates the receipts of cream and milk at New York City and the metropolitan area by states of origin for the year 1933:*

State	Receipts Milk 40 Quart Units	Cream 40 Quart Units
Connecticut	231,895	6,707
Delaware	34,887	3,292
Illinois	.....	725
Indiana	2,648	17,355
Maryland	153,104	670
Massachusetts	133,206	868
Michigan	.....	642
Missouri	.....	800
New Jersey	3,337,760	23,474
New York	22,383,523	1,135,418
Ohio	4,910	30,248
Pennsylvania	5,383,028	200,578
Tennessee	496	5,600
Texas	.....	200
Vermont	1,376,316	121,346
West Virginia	.....	200
Wisconsin	.....	25,338
Total	33,041,773	1,573,461

*Source: United States Department of Agriculture, Bureau of Agricultural Economics.

(Testimony of E. W. Gaumnitz)

The following table indicates the receipts of milk and cream at Boston and the metropolitan area by states of origin during the year 1933:*

State	Milk 40 Quart Units	Cream 40 Quart Units
Connecticut	.....	200
Illinois	.....	3,950
Indiana	.....	22,563
Kansas	.....	7,975
Maine	769,494	52,626
Maryland	.....	1,700
Massachusetts	544,091	1,509
Michigan	.....	45,302
Minnesota	.....	21,882
Missouri	.....	30,703
New Hampshire	670,569	19,954
New York	359,366	23,325
Ohio	.....	15,435
Rhode Island	1,883	73
Tennessee	.....	11,383
Vermont	3,376,147	228,457
Wisconsin	.....	52,162
Pennsylvania	.....	207
Total	5,721,550	539,406

*Source: U. S. Department of Agriculture, Bureau of Agricultural Economics, Division of Dairy and Poultry Products.

(Testimony of E. W. Gaumnitz)

The following table indicates the receipts of milk and cream at Philadelphia, and the metropolitan area, by states of origin during the year 1933:*

State	Milk 40 Quart Units	Cream 40 Quart Units
Delaware	517,018	3,178
District of Columbia	.....	150
Illinois	.....	2,263
Indiana	340	44,434
Maryland	847,706	34,202
Michigan	.....	1,400
Minnesota	.....	5,925
Missouri	.....	4,009
New Jersey	562,933	2,032
New York	.....	2,121
Ohio	.....	8,940
Pennsylvania	4,844,597	69,497
Texas	.....	200
Virginia	5,548	4,434
West Virginia	9,367	2,620
Wisconsin	122	83,172
Total	6,787,631	268,577

*Source: U. S. Department of Agriculture, Bureau of Agricultural Economics, Division of Dairy and Poultry Products.

The following table indicates the receipts of butter (gross pounds) at four markets by states of origin for the year 1933:*

1933	New York	Chicago	Philadelphia	Boston
Alabama	1,392	239	.....	.....
Arkansas	129,101	1,656,263	21,942	6,650
California	.....	42,359	.....	.....
Colorado	64,566	761,176	.....	15,335
Connecticut	3,038	.....	.....	.....
Delaware	400	.....	6,643	.....
District of Columbia	775	.....	.....	.....
Florida	95	.....	.....	.....
Georgia	2,445	.....	1,565	.....
Idaho	21,600	284,407	.....	.....
Illinois	15,778,061	17,846,325	2,750,937	12,459,789
Indiana	5,633,365	5,620,280	2,207,791	2,197,016
Iowa	83,752,200	46,620,767	10,317,776	6,895,596
Kansas	15,582,304	25,953,696	303,130	801,640
Kentucky	870,231	1,321,322	778,365	125,187

1933	New York	Chicago	Philadelphia	Boston
Louisiana	20,092	.....	.....	.....
Maine	.....	.....	.....	20,095
Maryland	1,062	.....	143,180	.....
Massachusetts	197	325	.....	209,612
Michigan	7,665,692	5,924,179	173,718	697,962
Minnesota	82,537,383	27,362,114	55,563,328	30,916,517
Mississippi	572,253	440,948	279,792	141,428
Missouri	5,849,702	18,480,629	2,974,592	4,127,212
Montana	5,092	60,050	.....	.....
Nebraska	33,870,758	18,281,379	6,292,223	4,547,053
New Hampshire	.....	.....	.....	957
New Jersey	29,922	.....	.....	520
New Mexico	.....	199,021	.....	.....
New York	4,756,528	41,120	121,548	542,190
North Carolina	8,605	.....	13,973	.....
North Dakota	4,612,840	2,244,264	975,997	8,178,353
Ohio	7,575,997	113,815	961,749	3,297,162

Oklahoma	1,927,593	6,930,879	342,638	1,979,300
Pennsylvania	1,426,374	1,816	355,894	.....
Rhode Island	.....	.....	.....	1,350
South Carolina	14	.....	700	.....
South Dakota	2,251,445	15,045,363	1,029,752	5,452,793
Tennessee	814,463	479,013	1,271,906	.....
Texas	2,317,542	5,049,965	1,098,509	292,814
Utah	31,800	.....	.....	.....
Vermont	22,245	.....	.....	126,051
Virginia	363,608	.....	1,039,939	.....
Washington	62,525	.....	360	.....
West Virginia	192,010	.....	70,747	.....
Wisconsin	11,692,037	60,226,871	3,287,957	5,242,400
Wyoming	10,517	12,803	.....	.....
Canada	680	.....	.....	.....
Total	290,448,531	261,001,289	92,386,651	88,274,982

*Source: U. S. Department of Agriculture, Bureau of Agricultural Economics.

The following table indicates the receipts of cheese (gross pounds) at four principal markets, by states of origin, during the year 1933:*

1933	New York	Chicago	Philadelphia	Boston	Total 4 Markets
Alabama	.....	370	.....	.....	370
Arizona	.....	608	.....	.....	608
California	179,774	2,288	.....	980	183,043
Colorado	1,383	22,629	.....	.....	24,012
Connecticut	1,413	.....	.....	.....	1,413
Dist. of Columbia	210	.....	.....	.....	210
Florida	38	.....	.....	.....	38
Illinois	10,957,495	3,657,629	2,461,640	691,390	17,768,154
Indiana	770,257	99,947	978	39,490	910,672
Iowa	85,051	60,646	6,070	6,904	158,671
Kansas	65,481	39,952	.....	.....	105,433
Kentucky	2,428	64,305	.....	.....	66,733
Louisiana	.....	2,748	.....	.....	2,748
Maine	283	.....	.....	24	307

Maryland	386	.....	.....	.....	386
Massachusetts	22,115	95,285	.....	200	117,600
Michigan	1,366,380	92,484	776,978	351,791	2,587,633
Minnesota	1,100,045	1,351,090	935,689	259,082	3,646,106
Mississippi	425	2,223	.....	.....	2,648
Missouri	131,806	110,584	.....	78,510	320,900
Nebraska	77,563	56,309	.....	2,080	135,952
New Hampshire	.....	.....	.....	13	13
New Jersey	15,349	82,052	1,718	140	99,259
New Mexico	.....	7,291	.....	.....	7,291
New York	5,782,144	2,571,109	973,945	3,023,571	12,350,769
No. Dakota	.....	3,367	.....	7,597	10,964
Ohio	465,546	51,014	22,527	10,995	550,082
Oklahoma	211	342	.....	.....	553
Pennsylvania	92,340	21,949	22,159	.....	136,448
Rhode Island	1,110	.....	.....	.....	1,110
So. Dakota	69,348	75,519	.....	.....	144,867

1933	New York	Chicago	Philadelphia	Boston	Total 4 Markets
Tennessee	30,000	1,615	.....	.....	31,615
Texas	64,357	2,504	.....	.....	66,861
Utah	316	.....	.....	.....	316
Vermont	42,853	.....	.....	131,403	174,256
Virginia	184,430	13,027	.....	.....	197,457
Washington	.....	1,150	.....	.....	1,150
W. Virginia	25,148	.....	.....	.....	25,148
Wisconsin	37,805,470	28,267,232	18,077,763	13,074,317	97,224,782
Wyoming	.....	215	.....	.....	215
Canada	509,039	131,490	.....	1,440	641,969
Total	50,850,194	36,888,974	23,279,667	17,679,927	137,698,762

*Source: U. S. Department of Agriculture, Bureau of Agricultural Economics, Division of Dairy and Poultry Products.

(Testimony of E. W. Gaumnitz)

D. Exports and imports of dairy products.

The following table indicates the volume of domestic exports of butter from the United States, by countries of destination for the year ended June 30, 1933:[1/]

Country	Amount 1000 pounds
United Kingdom	1
Honduras	108
Panama	369
Mexico	128
Cuba	1
Haita, Republic of	291
Other West Indies [2/]	214
Columbia	12
Peru	14
Venezuela	45
Philippine Islands	83
Other countries	120
Total	1386

1/ Source: Yearbook of Agriculture, 1934.
2/ Excludes Bermudas.

Domestic exports of cheese from the United States, by countries of destination, for the year ended June 30, 1933, were as follows:[1/]

Country	Amount 1000 pounds
Panasa	640
Mexico	69
Canada	44
Honduras	50

(Testimony of E. W. Gaumnitz)

British Honduras	25
Cuba	56
Virgin Islands	59
Haiti, Republic of	26
Other West Indies [2/]	72
China	36
Philippine Islands	150
Other countries	119
Total	1346

1/ Source: Yearbook of Agriculture, 1934.
2/ Excludes Bermudas.

The following table indicates the domestic exports of condensed milk during the year ended June 30, 1933, by countries of destination:[1/]

Country	Amount 1000 pounds
Total Europe	31
Cuba	360
Philippine Islands	1382
Hong Kong	1525
China	699
Mexico	224
Jamaica	1073
Honduras	282
Costa Rica	129
Venezuela	176
Other countries	666
Total	6347

1/ Source: Yearbook of Agriculture, 1934.

(Testimony of E. W. Gaumnitz)

The following table indicates the exports (domestic) of evaporated milk from the United States, by countries of destination, for the year ended June 30, 1933:[1/]

Country	Amount 1000 pounds
United Kingdom	926
Other Europe	31
Total Europe	957
Philippine Islands	19,598
Panama	4,616
Peru	242
China	555
British Malaya	628
Cuba	179
Japan	184
Mexico	700
Netherland West Indies	1,373
Netherland East Indies	879
Siam	1,847
Newfoundland and Labrador	503
Other countries	1,405
Total	33,666

1/ Source: Yearbook of Agriculture, 1934.

(Testimony of E. W. Gaumnitz)

Imports of butter into the United States, by countries of origin, for the year ended June 30, 1933, were as follows:[1/]

Country	Amount 1000 pounds
United Kingdom	129
Denmark	134
Other Europe	106
Total Europe	359
New Zealand	547
Canada	64
Other countries	21
Total	991

1/ Source: Yearbook of Agriculture, 1934.

Imports of cheese into the United States, by countries of origin, for the year ended June 30, 1933, were as follows:[1/]

Cheese, Emmenthaler (Swiss)

Country	Amount 1000 pounds
Switzerland	10,492
Denmark	518
Germany	420
Other countries	874
	12,304

(Testimony of E. W. Gaumnitz)

Cheese other than Swiss	
Italy	30,398
France	3,775
Netherlands	2,177
Switzerland	1,516
Other Europe	3,936
Total Europe	41,802
Canada	1,109
Other countries	708
	43,619

1/ Source: Yearbook of Agriculture, 1934.

E. Intermarket price relationships.

The free flow of manufactured dairy products between different markets in response to price changes engendered by changing supply and demand conditions results in decidedly close correlation between the prices of dairy products in different markets. The relationship between the wholesale price of 92 score butter at New York City and Chicago, Illinois, is shown in Figure 3. If the wholesale price of 92 score butter at New York should become so high relative to the wholesale price of 92 score butter at Chicago that shippers of butter could make a greater profit by shipping their butter to New York than to Chicago, they would do so, increasing supplies on the New York City market and thereby tending to reduce prices in New York City relative to prices in Chicago, and vice-versa if the wholesale price of

(Testimony of E. W. Gaumnitz)

92 score butter at Chicago should become such that it were more profitable to ship butter to Chicago rather than New York City.

In addition to the above intermarket price relationships, the supply of the raw material, butterfat, is interchangeable between products, so that the prices received by producers of butterfat in all uses tend to be markedly inter-related. These producer price inter-relationships are due to the fact that farmers can and do shift their disposal of butterfat from one use to another as price conditions warrant, thereby tending to keep the farm price of butterfat in any one of the several uses closely associated with the farm prices of butterfat in all other uses.

The above generalization is substantiated by a consideration of the relationships between (1) the index of the United States average farm price of butterfat and the index of the United States farm price of milk sold at wholesale (such indices are the percentage each yearly price is of the 1910-1914 average of the yearly average prices, or in other words, the 1910-1914 average of the yearly average prices - 100), (2) the index of the United States average farm price of butterfat and the index of the United States average farm price of butter (in both cases the 1910-1914 average of the yearly average prices - 100), (3) the average monthly farm prices of butterfat in the United States and the average monthly wholesale prices of 92 score butter at New York City and Chicago, and (4) the United States farm price of butterfat and the prices paid pro-

(Testimony of E. W. Gaumnitz)

ducers for milk at condenseries, such milk being utilized in the manufacture of condenses and evaporated milk.

The relationships noted in (1), (2), (3) and (4) above are depicted graphically in Figures 1, 2, 3 and 4 to 11 respectively (figures 4 to 11 depicting the relationship between the United States average farm price of butterfat and the price paid producers at condenseries (processing plants engaged in the manufacture of condensed and evaporated milk) by geographical divisions); such figures being as follows:

FIGURE I:
Relationship between index of U.S. farm price of butterfat and index of U.S. farm price of milk wholesale, 1910 - 1933.

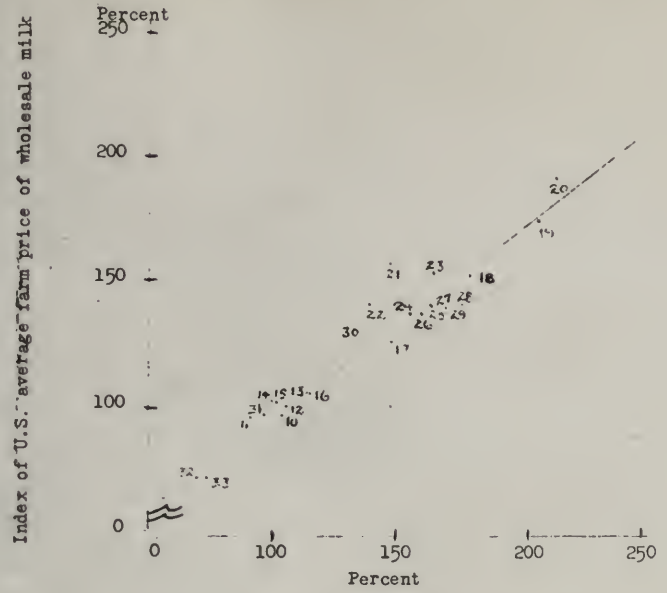


FIGURE II:
Relationship between index of U.S. farm price of butterfat and index of U.S. farm price of butter, 1910 - 1933.

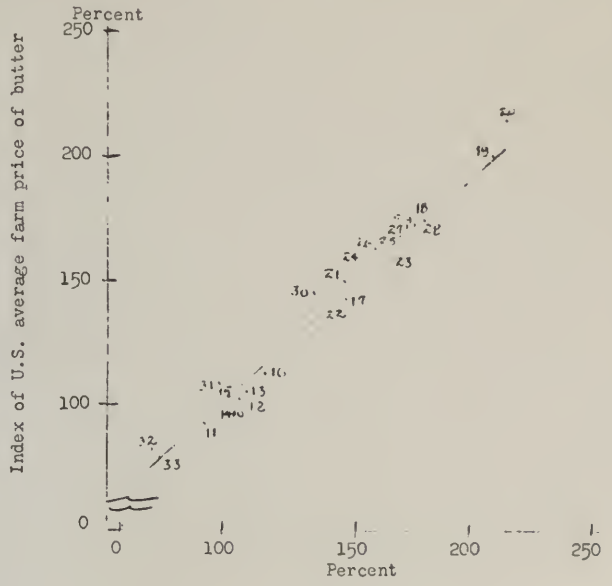
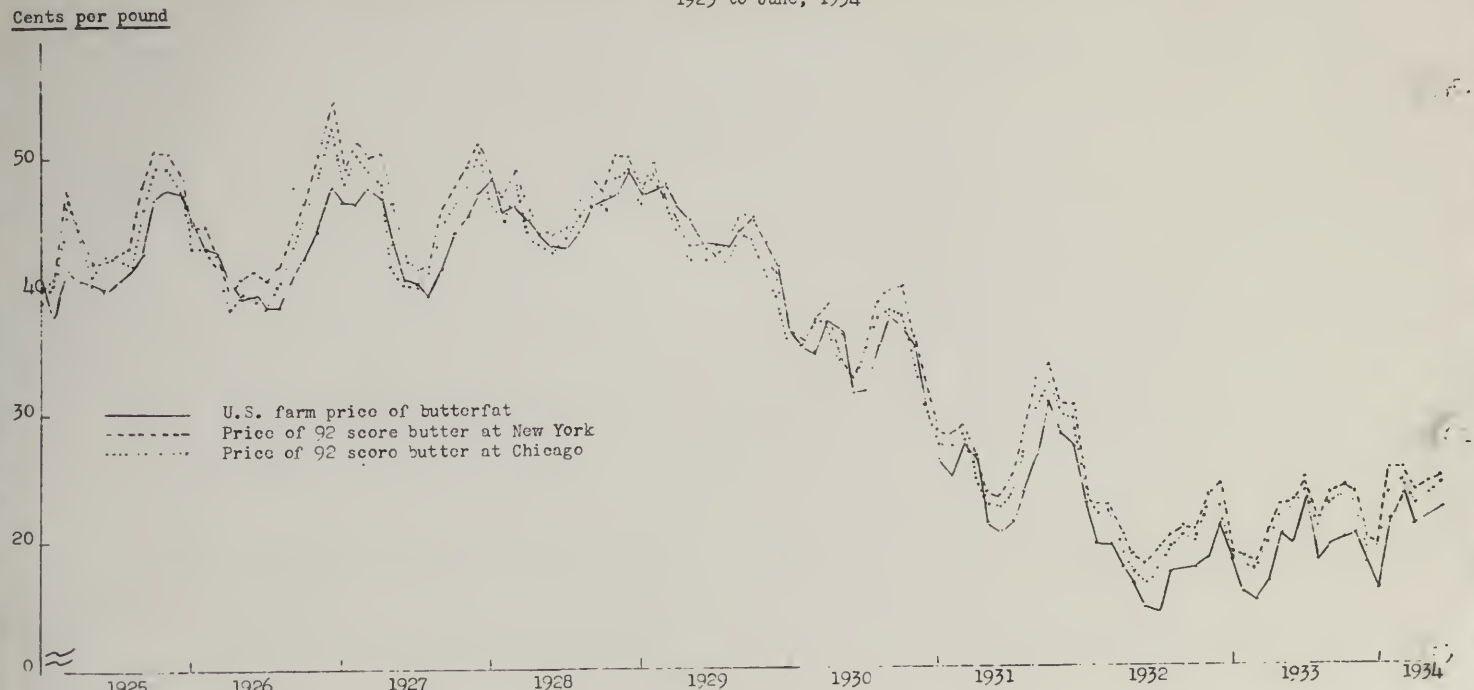


FIGURE 3 -- Average monthly prices of butterfat in the United States and average monthly wholesale prices of 92 score butter in New York and Chicago.
1925 to June, 1934



DA-12c

FIGURE 4 -- Relation between U.S. farm prices of butterfat and prices paid to producers for 3.5% milk per cwt. delivered at condenseries in the United States

1922-1933

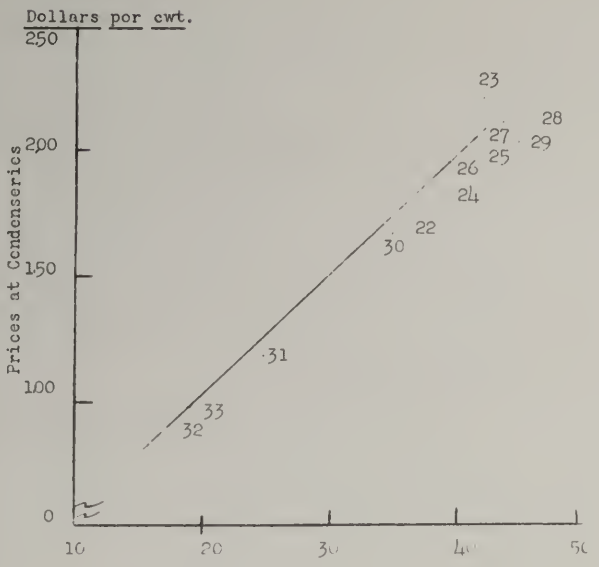


FIGURE 5 -- Relation between U.S. Farm Prices of butterfat and prices paid to producers for 3.5% milk per cwt. delivered at Condenseries in Middle Atlantic Section. 1922-1933

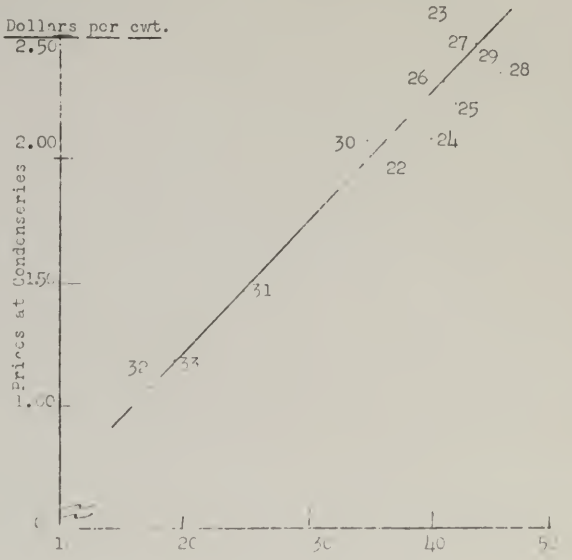


FIGURE 6 -- Relation between U.S. farm price of butterfat and prices paid to producers for 3.5% milk per cwt. delivered at Condenseries in South Atlantic section

1928-1933

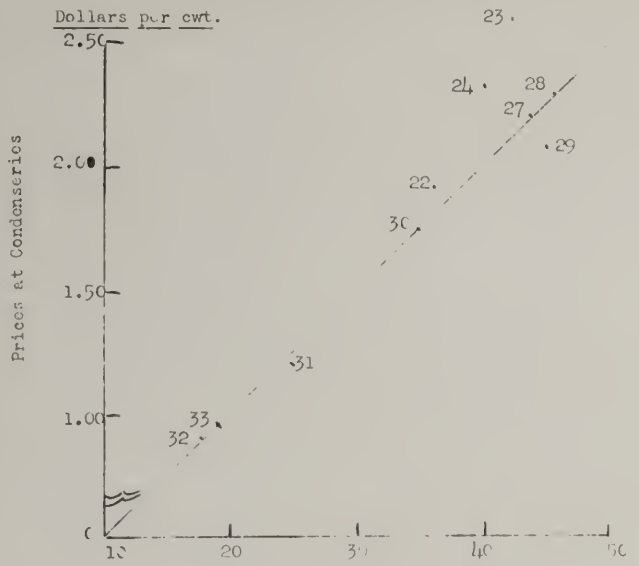


FIGURE 7 -- Relation between U.S. farm price of butterfat and prices paid to producers for 3.5% milk per cwt. delivered at Condenseries in East North Central section

1928-1933

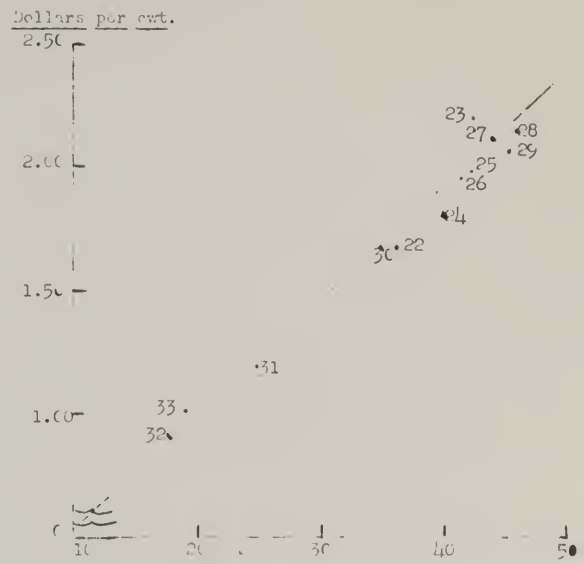


Fig. 8 - Relation between U. S. farm prices of Butterfat and prices paid to Producers for 3.5% milk per cwt. deliverod at Condensories in Western and Contral Soction 1922-1933

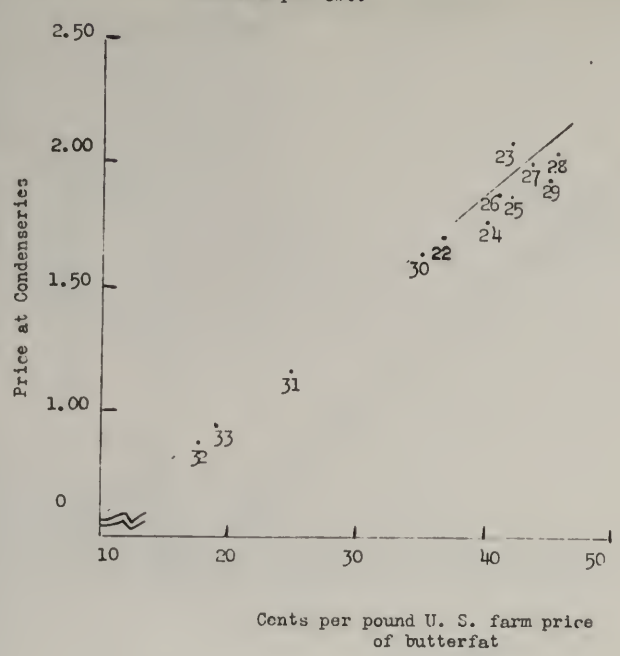


Fig. 9 - Relation between U. S. farm prices of Butterfat and prices paid to Producers for 3.5% milk per cwt. delivered at Condenseries in South Central Section 1922-1933

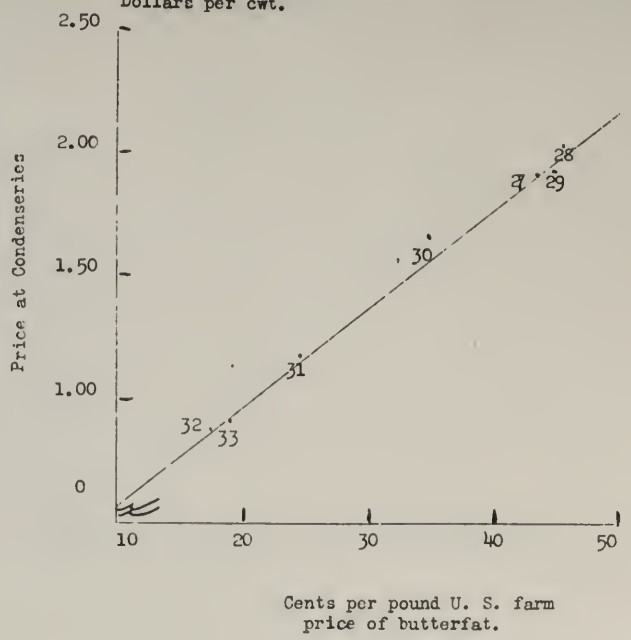


Fig. 10 - Relation between U. S. farm prices of Butterfat and prices paid to Producers for 3.5% milk per cwt. delivered at Condensories in North West Central Section
1922-1933

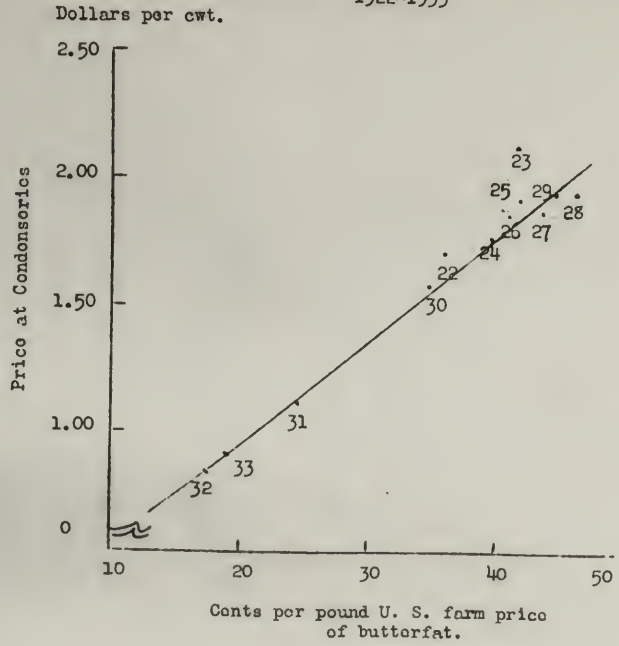
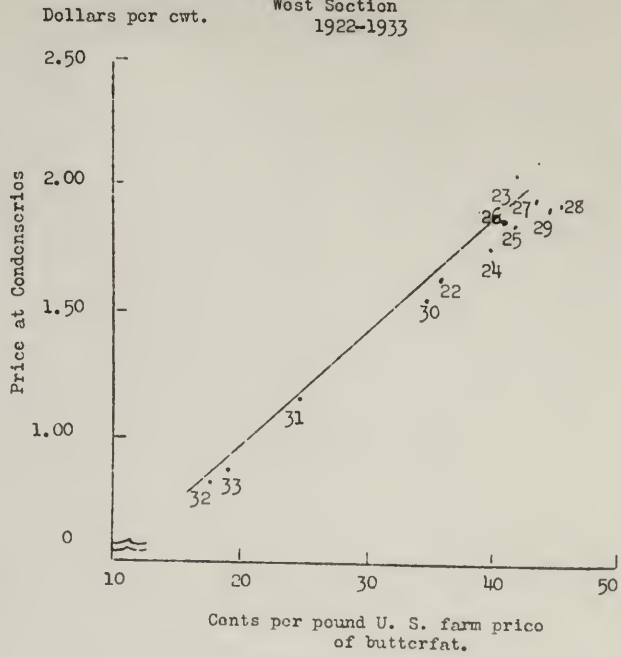


Fig. 11 - Relation between U.S. farm prices of Butterfat and prices paid to Producers for 3.5% milk per cwt. delivered at Condensories in South West Section
1922-1933



(Testimony of E. W. Gaumnitz)

The marked relationships noted above obtain because of the interchangeability of the supply of the raw material, butterfat, and substantiate the contention that any regulation that tends to stabilize and raise the price of butterfat in any one of the major products in which butterfat is utilized, also tends to stabilize and raise the price of betterfat in all uses.

The prices received by producers for milk used for consumption as fluid milk are also closely related to the prices received by producers for butterfat used in the production of manufactured dairy products. These close relationships arise from the fact that it is impossible to accurately foercast the daily requirements of fluid milk in any milk market, so that milk intended for fluid distribution finds its way into manufactured products; and the fact that the price relationships between fluid milk and milk for manufacturing purposes indicate that the interchangeability of supply of milk for fluid distribution and of milk for manufacturing purposes is of such nature that fluid milk prices in any given area are subject to the same supply and demand forces on a national scale as those to which manufactured products are subject.

The demand for fluid milk in any given market varies markedly from day to day. So important is this factor that producers must supply a quantity at least 15 percent in excess of the average daily consumption in the market, a margin of safety, in order to meet unpredictable daily variation in demand. In addition, in most milk markets an amount in excess of the daily sales plus the

margin of safety is usually produced and brought to the distributor's plant. This milk is collected from the farmer and is combined and processed in the distributor's plant, so that the milk of any producer so handled is indistinguishable from that of any other producer. In addition, it is impossible to determine at this point what portion of the milk in the distributor's plant will finally be consumed as fluid milk in that market, or what portion of the milk will be converted into manufactured dairy products and perhaps sold in distant markets. It is quite common for distributors to have "route returns", that is, milk that is bottled for fluid distribution, is taken out on the delivery route, and, finding no market, is utilized in manufactured dairy products.

The above generalizations are substantiated by inter-market price relationships, and by the relationships between prices of fluid milk and milk for manufacturing purposes. If fluid milk prices in any given market were not affected by the prices of milk in other distant markets and by the price of butterfat in all other uses, and did not in turn affect the price of milk and butterfat in other distant markets and in other uses, there would be little reason to expect a close relationship between the prices received by producers of fluid milk and those received by producers of milk for manufacturing purposes.

However, the prices received by producers for fluid milk testing 3.5 percent butterfat used for fluid consumption are closely related to the United States average farm price of butterfat. These relationships are not re-

(Testimony of E. W. Gaumnitz)

stricted to a country-wide consideration; the prices received by producers in every market area, whether surplus or deficit, bear these marked relationships to the United States average farm price of butterfat. Since it was demonstrated in the foregoing pages that the prices received by producers for butterfat entering into specific uses are closely related to the United States average farm price of butterfat, it naturally follows that the prices received by producers for milk used for fluid consumption are closely associated with the prices received by producers for butterfat entering all other uses.

The relationships noted above are graphically depicted in figures 12 to 21, inclusive, which show the relationship between the United States average farm price of butterfat and the prices paid producers for 3.5 percent milk used for fluid consumption in the markets of Hartford, Connecticut; New York City, New York; Boston, Massachusetts; Washington, D. C.; Los Angeles, California; Baltimore, Maryland; Seattle, Washington; Richmond, Virginia; Milwaukee, Wisconsin; and Louisville, Kentucky. Figures 12 to 21 are as follows:

DA-12g

FIGURE 12:
Relationship between U.S. farm price of butterfat lagged one year and prices paid producers for 3.5% milk used for fluid consumption f.o.b. Hartford, Conn., 1923 - 1933

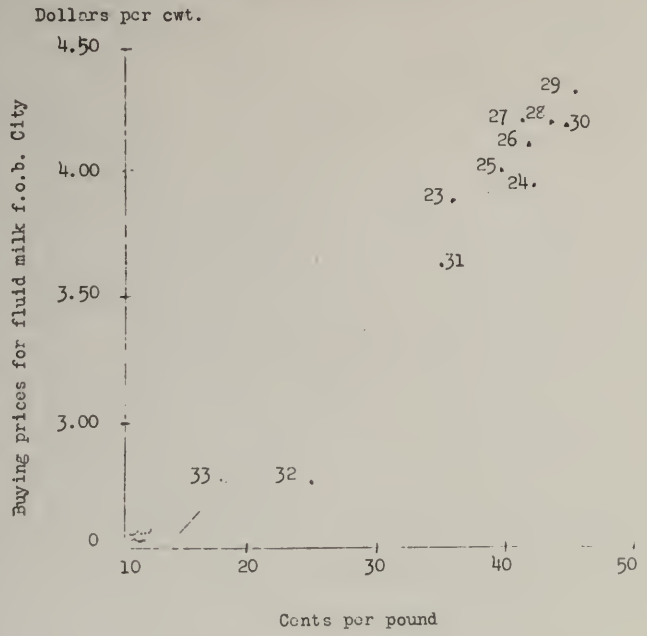


FIGURE 13:
Relationship between U.S. farm price of butterfat lagged one year and prices paid producers for 3.5% milk used for fluid consumption, 200 mile zone, New York City, 1923 - 1933

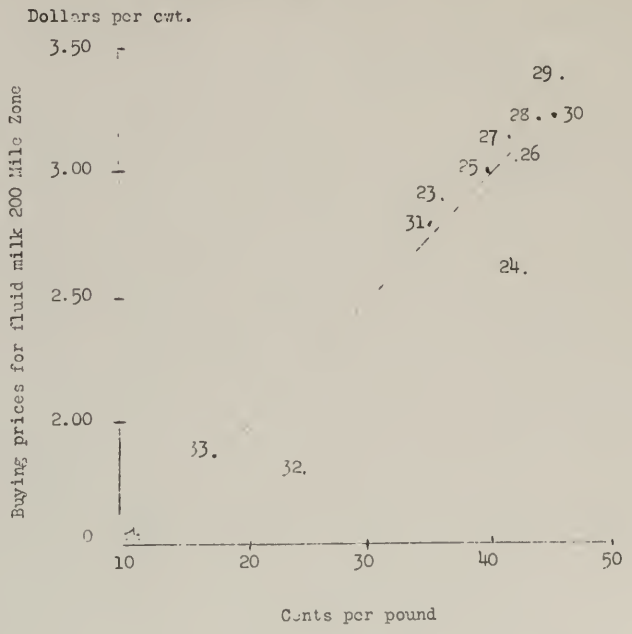


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FIGURE 14:
Relationship between U.S. farm prices of butterfat lagged one year and prices paid producers for 3.5% milk used for fluid consumption f.o.b. Boston, 1923 - 1933

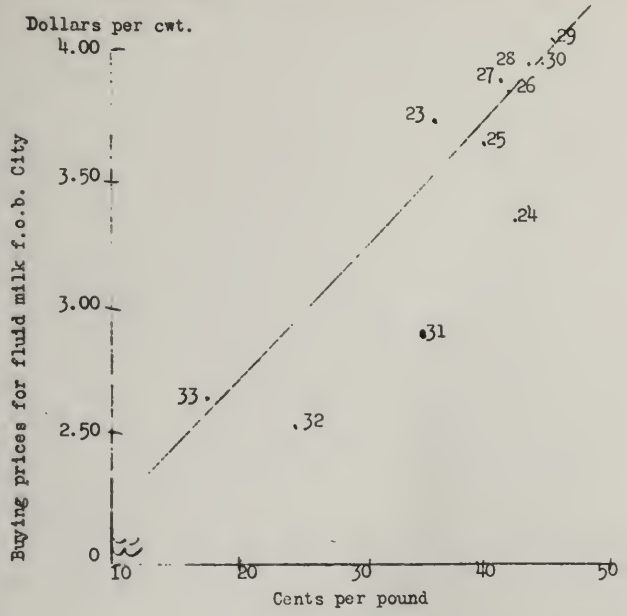

FIGURE 15:
Relationship between U.S. farm prices of butterfat lagged one year and prices paid producers for 3.5% milk used for fluid consumption f.o.b. Washington, 1924 - 1933

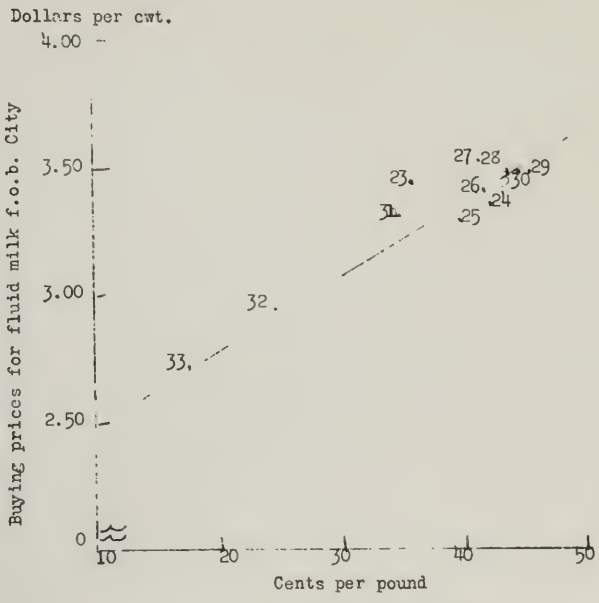

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FIGURE 16: - Relationship between U.S. Farm Prices of Butterfat Lagged ono year and prices paid producers for 3.5% milk used for Fluid Consumption f.o.b. Los Angeles 1923-1933

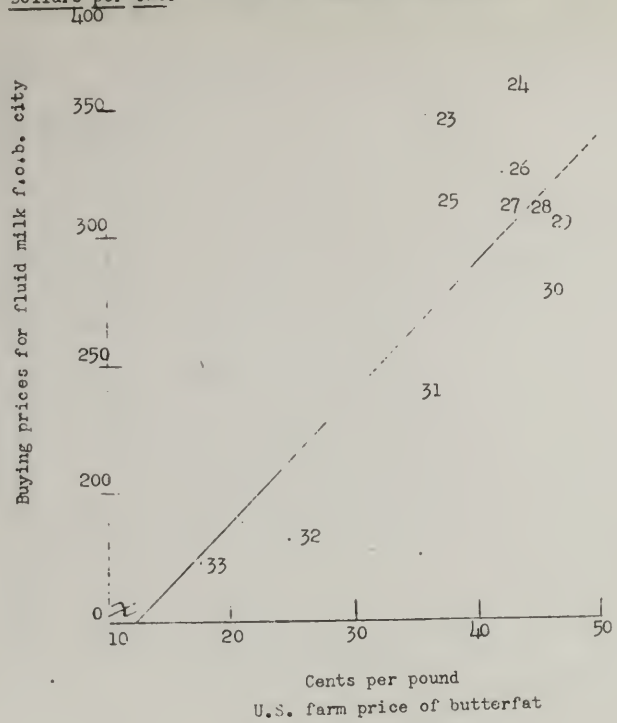
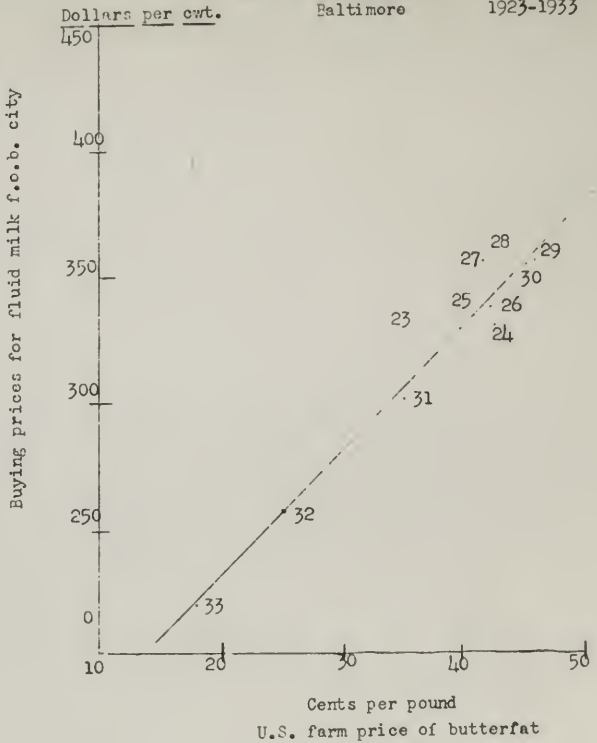


FIGURE 17: - Relationship between U.S. farm prices of Butterfat Lagged One Year and Prices paid producer for 3.5% milk used for Fluid Consumption f.o.b. Baltimore 1923-1933



DA-12j

FIGURE 18:
Relationship between U. S. farm prices of butterfat and prices paid producers for 3.5% milk used for fluid consumption f.o.b. Seattle, Washington, 1922 - 1933.

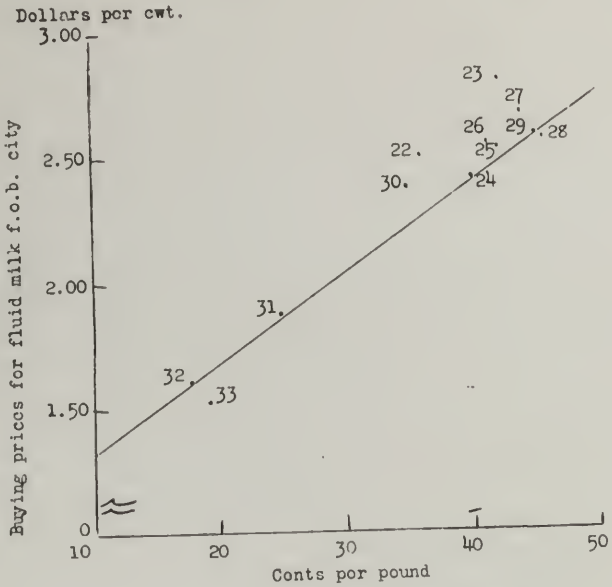


FIGURE 19:
Relationship between U. S. farm prices of butterfat and prices paid producers for 3.5% milk used for fluid consumption f. o. b. Richmond, Virginia, 1922 - 1933.

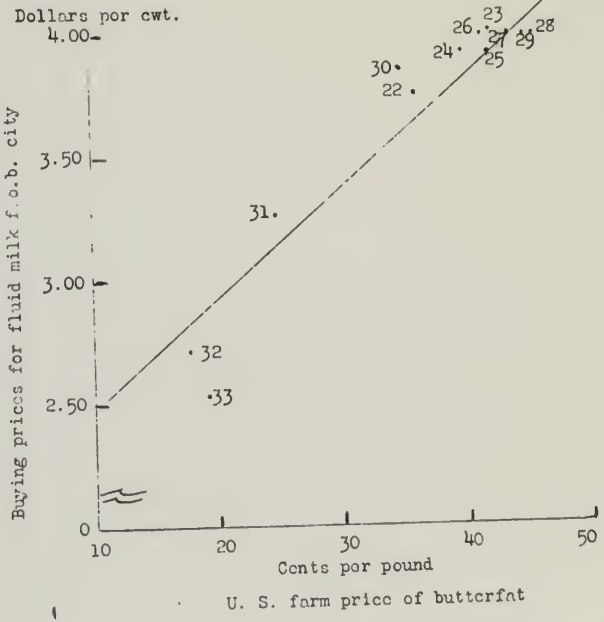


FIGURE 20:
Relationship between U.S. farm prices of butterfat lagged one year and prices paid producers for 3.5% milk used for fluid consumption f.o.b. Milwaukee, 1923 - 1933

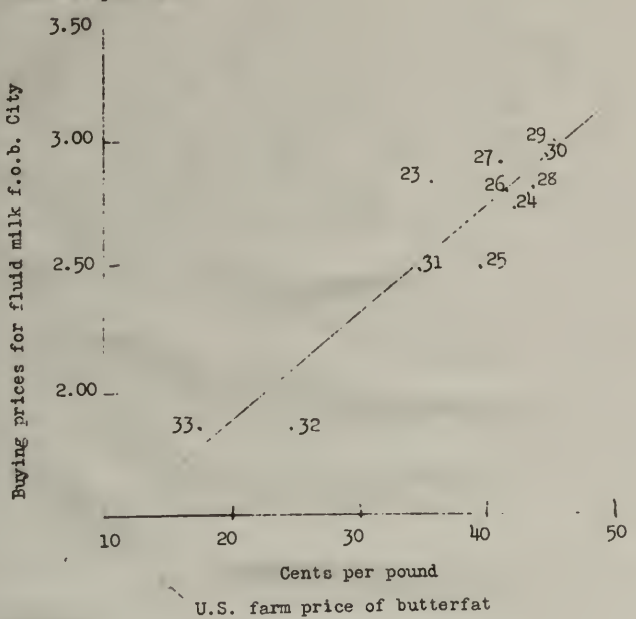
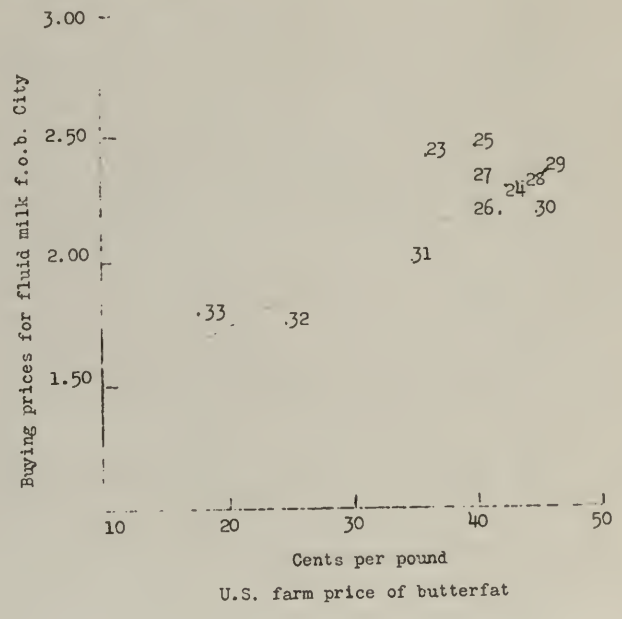


FIGURE 21:
Relationship between U.S. farm prices of butterfat lagged one year and prices paid producers for 3.5% milk used for fluid consumption f.o.b. Louisville, Kentucky, 1923 - 1933



(Testimony of E. W. Gaumnitz)

The relationships noted above obtain because farmers will, over a period of time, shift their method of disposal of the milk they produce as price conditions warrant. If an adequate supply of fluid milk is to be assured in any given market, the prices received by producers must be sufficient, over a period of time, to cover the additional costs incurred in the production of high quality milk for consumption as fluid milk. On the other hand, the existence of abnormal differentials between the price of fluid milk and milk for manufacturing purposes will cause producers to shift their marketing in the direction of the more favorable prices, continuing the process until normal price relationships are restored.

F. Interstate and foreign commerce in dairy products, Los Angeles Area.

Available information indicates that during 1933, the excess of milk delivered to Los Angeles over that distributed and consumed in fluid milk averaged 20,000 pounds daily. This excess milk is manufactured into other dairy products, and enters into competition with and directly burdens and affects the interstate commerce in milk and other dairy products in the Los Angeles Sales Area.

The extent of the foreign and inter-coastal water borne commerce in milk and dairy products in the Los Angeles Sales Area is indicated in the following tables.

The following table indicates the coastwise shipments of dairy products from Los Angeles during the year 1933:[1/]

(Testimony of E. W. Gaumnitz)

State	Powdered Skim Milk (pounds)	Malted Milk (pounds)
Oregon	40,750	12,200
Washington	383,070	9,402
Virginia	101,000	.....
Louisiana	4,284	.....
Maryland	86,400	.....
Massachusetts	55,000	.....
New York	276,896	11,685
Total	947,400	33,287

1/ Source: Records of the Marine Exchange of the Los Angeles Chamber of Commerce. These records were compiled from Customs Records, Los Angeles District for the year 1933.

Exports from Los Angeles to Hawaii and foreign countries in 1933 were as follows:[1/]

Products	Hawaii (pounds)	Foreign Countries (pounds)
Cream	14,400	.....
Evaporated milk	870	110,690
Condensed Milk	.....	2,120
Powdered skim milk	101,320	1,190
Ice cream mix	4,160	1,450
Malted milk	9,880	240
Butter	52,980	30
Cheese	9,286	110
Milk sugar	.....	22,400

1/ Source: Records of the Marine Exchange of the Los Angeles Chamber of Commerce. These records were compiled from Customs Records, Los Angeles District for the year 1933.

Imports of dairy products into Los Angeles for the year 1933 were as follows:[1/]

In Pounds

Imports from	Malted Milk	Condensed Milk	Powdered Skim Milk	Butter	Cheese	Milk Sugar	Condensed Buttermilk
Foreign countries	.....	.....	.....	150	524,389	.....	.....
Coastwise inbound							
Oregon	5,350	.....	.....	.....	.....	.....	.....
Washington	35,953	8,000	57,011	.....	.....	.....	.....
Intercoastal inbound							
New York	506,615	9;600	262,456	.....	.....	5,600	.....
Pennsylvania	16,220	.....	.....	.....	.....	.....	.....
Louisiana	.....	.....	.....	.....	.....	.....	40,756

1/ Source: Records of the Marine Exchange of the Los Angeles Chamber of Commerce. These records were compiled from Customs Records, Los Angeles District for the year 1933:

The following table indicates the receipts of butter at Los Angeles by states of origin during the period 1925 to 1933, inclusive:[1/]

(1000 lbs., i.e. 000 omitted)

State	1925	1926	1927	1928	1929	1930	1931	1932	1933
Arizona	.....	13	26	85	37	.....	25	26	447
California	23,422	22,011	20,692	22,659	17,069	16,155	18,040	16,359	15,491
Colorado	875	749	603	748	936	1,057	1,668	2,068	2,741
Idaho	8,555	13,101	13,224	12,945	15,335	16,678	16,920	17,627	16,923
Illinois	144	.....	21	.....	104	.....	.....	23	.....
Iowa	.....	19	7	.....	.....	.....	.....	.....	.....
Kansas	.....	26	25	.....	50	24	.....	.....	53
Minnesota	410	.....	.....	.....	26	48	.....	.....	.....
Missouri	.....	1	1	.....	.....	2	.....	.....	.....
Montana	1,541	1,953	1,048	1,280	1,405	1,618	2,251	2,280	770
Nebraska	115	16	.....	.....	27	.....	61	77	410
Nevada	550	589	499	280	201	54	5	21	1
New Mexico	.....	.....	.....	.....	82	83	56	129	131

New York	236	6	1	.....	.....	.....	.....	.....	.....
Oklahoma	.....	.....	.....	1	2	.....	.....	.....	.....
Oregon	1,196	1,922	805	497	1,263	2,468	2,218	1,267	476
Pennsylvania	.....	1	.....	.....	.....	.....	.....	.....	.....
Texas	.....	.....	.....	.....	.....	.....	20	52	120
Utah	1,219	1,952	3,513	3,799	4,928	4,509	3,318	3,315	3,295
Washington	1,157	1,620	1,229	1,096	812	1,272	2,239	2,925	341
West Virginia	.....	.....	.....	.....	21	.....	.....	.....	.....
Wisconsin	294	45	.....	9	24	.....	.....	.....	.....
Wyoming	.....	24	73	55	26	47	92	69	110
Other States	212	.....	.....	.....	.....	.....	.....	.....	.....
	39,926	44,032	41,767	43,455	42,349	44,015	46,813	44,238	41,309
Percent of receipt from states other than California	41.3	50.0	50.5	47.9	59.7	63.3	61.5	61.0	63.5

1/ Source: U. S. Department of Agriculture, Bureau of Agricultural Economics, Division of Dairy and Poultry Products.

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Receipts of cheese at Los Angeles, for the years 1928 to 1933, inclusive, were as follows:[1/]

	Pounds
1928	14,585,733
1929	14,143,568
1930	14,894,514
1931	13,505,215
1932	14,414,155
1933	11,921,792

1/ Source: U. S. Department of Agriculture, Bureau of Agricultural Economics; Federal-State Market News Service.

California furnishes but a small percentage of the cheese for the Los Angeles market. In 1933, of the total receipts of 11,921,792 pounds of cheese at Los Angeles, but 1,224,986 pounds or 10.3 percent was produced in the State of California. Receipts of cheese in 1933, by states of origin, are given below:[1/]

State	Pounds
Arizona	7,571
California	1,224,986
Colorado	85,190
Idaho	3,101,577
Illinois	17,885
Minnesota	100,332
Nevada	60,860
New York	219,310
Oregon	3,424,883
Utah	2,059,379
Washington	23,633

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Wisconsin	1,581,184
Wyoming	15,002
Total	11,921,792

1/ Source: U. S. Department of Agriculture, Bureau of Agricultural Economics; Federal-State Market News Service.

G. The effect of price fluctuations in local markets on the interstate commerce in milk and dairy products.

As has already been described under the heading Economic Status of Milk Producers as a Result of the Depression, price fluctuations in many milk markets throughout the United States are caused by price wars, price cutting, and other methods of destructive competition among distributors. Price wars, price cutting, and other methods of destructive competition were prevalent in the Los Angeles milk market prior to the issuance of the Los Angeles Milk license. In the course of such practices, distributors reduce the prices paid by them to dairy farmers for market milk purchased below the point justified by the existing supply and demand situation. With the descent of prices, there results an adverse effect on the market of butter and of other manufactured dairy products in general, which effect has been translated through the intermediary of interstate commerce in such products into a decline of prices in interstate markets for milk in all of its usages. The happenings in this series of repercussions are in strict accord with the price relationships concretely established in the preceding pages and may be outlined in connection with the effect of the price fluctuations, as follows:

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(1) Effect of price fluctuations on local markets. The slump in prices of market milk by agency of destructive trade methods brings about the sale of a greater quantity of manufacturing milk to local processors, which increased sale results in a correspondingly increased amount of dairy products being locally manufactured. Such shifting of the method of disposal of the milk produced is readily explainable by the facts (a) that the differential between the price paid to the producer of market milk and the price paid to the producer of manufacturing milk normally tends to equal the difference between the cost of producing milk in conformity with the applicable health regulations of the market in which sold and the cost of producing milk which does not comply with such regulations, and (b) that if price conditions warrant, by such price differential being less than the difference in cost of production, producers will abandon the production of market milk to produce manufacturing milk .While it is true that a continuation of the process of shifting the method of disposal of the two kinds of milk will eventually restore the normal price relationship, as expained heretofore under the heading Relationships between milk prices, the accomplishment of this restoration is prolonged indefinitely through a continuation of price wars and a resultingly continued decline of market milk prices below the point justified by the existing supply and demand situation.

Thereafter, the increased output of dairy products in the local market is felt, in accord with the practical

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working of the law of supply and demand, by a destabilization of prices and the concomitant lowering of the price of butter, as one of these products; and, further, by an increase in the supply of butter that is transported to interstate markets to receive a price more favorable than that of the local market. The more favorable price in interstate markets is obtainable in conformity with the fact that the free flow of manufactured dairy products between markets results in inter-market price relationships of such nature that the prices of these products tend to vary between markets only by the amount of transportation costs from one market to the next, plus the necessary additional handling charges other than transportation.

Moreover, the disturbance of the price balance between fluctuating markets and interstate markets serves, following the rules of inter-market relationships just enunciated, to check the importation from the latter markets to the former of dairy products; since the price differential between the two classes of markets comes to be less than the cost of intermarket transportation charges, plus the necessary additional handling charges other than transportation.

(2) Effect of price fluctuations on interstate markets. The added influx of butter and other dairy products into these markets from unstabilized markets renders an increased supply of such products available for sale. The principle of intermarket price relationships, which began to operate in the unstabilized areas as noted in the foregoing pages, continues to operate on the inter-

state markets concurrently with the entry of the additional dairy products; and, resultingly, the price of butter, and the prices of other dairy products as well, tend to decline in conformity with the increased supply so that price levels equivalent to those of the fluctuating markets, plus the differential of transportation and extra handling charges, are reached.

Successively, the lowering of prices of dairy products conduces to the payment of lower prices for the manufacturing milk utilized in the manufacture of these products; a development which moves from the facts that (a) the prices of butter and other dairy products are the prime determinants of the price of butterfat, and (b) that the prices of butterfat in all its uses are determinants of the price of manufacturing milk. The markedly close relationships, on both national and local market scales, between the prices of butter and of other manufactured products and the price of butterfat serves to demonstrate these facts.

Finally, the lowered price of manufacturing milk results in a lowered price of market or fluid milk, since producers can and do shift their method of disposal of milk to distributors so that the difference in prices between the two kinds of milk comes to equal the added cost of preparing market milk for market.

(3) General effect of price fluctuations on all markets. Thus price cutting on local markets results in (a) the increase in supply of butter and other dairy products in the markets throughout the country, and (b) the decrease in prices paid to producers of manufacturing

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milk and to producers of market milk. The effect of these local practices on the national market for manufactured dairy products and upon the price in other markets is emphasized when these practices occur simultaneously in many local markets.

The same general effect tends to establish the fact that the fluid milk price in any given market tends to influence the fluid milk price in other distant markets and to influence the price of milk used in manufactured dairy products in interstate commerce.

V. PROVISIONS OF LICENSE FOR MILK, LOS ANGELES MILK SHED, LICENSE NO. 17, ISSUED NOVEMBER 16, 1933.

A. Prices to be paid producers.

The provisions in regard to prices that are to be paid producers are found in Exhibit A of the License.

The following table indicates the monthly farm prices of all milk sold at wholesale, and parity prices for such milk, during the period January to October, 1933, inclusive:

Month	Farm Price of Milk Sold at Wholesale	Parity Price of Milk Sold at Wholesale
January	$1.70	$1.93
February	1.55	1.87
March	1.50	1.82
April	1.25	1.80
May	1.35	1.77
June	1.35	1.76
July	1.60	1.86

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August	1.60	1.97
September	1.60	2.08
October	1.65	2.13
Average for ten months' period	1.52	1.90

The following table indicates the dealers' buying prices f.o.b. city of Class I milk testing 4 percent butterfat, and the parity prices for such milk, during the period January to October, 1933, inclusive:

Month	Dealers' buying prices f.o.b. city of Class I milk testing 4 percent butterfat	Parity prices of 4 percent milk f.o.b city	Parity price per pound of butterfat
January	$2.20	$2.68	67.0
February	2.20	2.65	66..2
March	2.20	2.60	65.0
April	1.60	2.60	65.0
May	1.25	2.59	64.8
June	1.81	2.59	64.8
July	1.81	2.71	67.8
August	2.14	2.87	71.8
September	2.21	3.02	75.5
October	2.21	3.04	76.0
Average for ten months' period	1.96	2.74	68.4

The farm price of milk sold at wholesale includes all milk sold at wholesale by farmers, a portion of such milk being used for distribution and consumption as

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fluid milk, and the remaining portion being used in manufacture of dairy products. The dealers' buying prices f.o.b city for Class I testing 4 percent butterfat are prices paid for milk which is used, except in case of surplus over market requirements, for distribution and consumption as fluid milk.

The differential between the prices paid producers for all milk sold at wholesale and prices paid producers f.o.b. city for Class I milk testing 4 per cent butterfat (Grade A milk and Class I milk are the same, both terms referring to milk purchased for distribution and consumption as fluid milk) represents, (1) a fair and reasonable premium to compensate the producer for the additional costs of producing high quality milk; (2) an allowance to compensate producers for the costs of transporting fluid milk, which is bulky and perishable; and (3) an allowance to compensate the producer for maintaining a relatively stable volume of production of high quality milk somewhat larger than the average daily volume actually sold as Class I in the market, this volume in addition to actual average sales being required to meet daily fluctuations in the sales of fluid milk.

The prices for Class I (or Grade A) milk specified in the License (45c, 51c, and 61c per pound butterfat in such milk, depending on the price of butter) are directly related to the wholesale price of 92-score butter in Los Angeles. The reasons for so relating the price of Grade A or Class I milk to the wholesale price of 92-score butter in Los Angeles, as well as the reasons for fixing prices somewhat lower than the parity price, are as fol-

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lows: Class I or Grade A milk sold for consumption as milk must be produced under highly sanitary conditions in accordance with local health regulations. The cost of producing such milk is therefore substantially higher than the cost of producing milk used in the manufacture of butter, cheese, condensed and evaporated milk, and other manufactured milk products, and a higher price to the producer of such milk is economically justified. However, such prices must be maintained in a reasonable relationship to the prices received by producers of manufacturing milk. If a price for Class I milk were fixed at an unreasonably high figure above the prices received by producers for manufacturing milk, producers who had formerly produced milk for manufacturing purposes only would equip their farms for the production of high quality milk. This would tend to subject the fluid milk market to serious pressure through substantially increasing the market surplus, and would tend to result in a lower average price for all producers in the market.

The foregoing considerations and competitive factors impose imitations upon the prices which may justifiably be fixed and maintained under the License. The provision of the License specifying the prices paid to producers for Class I (or Grade A) milk is of such nature that as butter prices increase, fluid milk prices also increase, thereby tending gradually to approach the parity price.

The prices specified in the License for milk used to produce cream include a reasonable premium over the wholesale price of 92-score butter at Los Angeles to

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compensate the producer for the additional costs incurred in producing cream of sufficiently high quality to meet the requirements of the city health ordinances specifying the quality requirements for milk used to produce the cream distributed and consumed in the Los Angeles Sales Area. The differential between the prices specified in different counties represents a reasonable allowance for differences in transportation costs between counties.

The prices specified in the License for milk delivered in bottles to contracting distributors (except to stores) are such that the producers of such milk are given a reasonable premium over the prices received by producers of bulk market milk to compensate them for the labor cost incurred in bottling the milk for delivery to distributors.

B. The adjusted base price.

The provision in regard to the computation of the adjusted base price is found under the heading "Establishment of Adjusted Base Price" in Exhibit C of the License.

This provision is necessary in order that all producers share equitably in the gains to be derived by the classification of sales of milk according to use, and to distribute the surplus burden among all producers, as set forth hereinafter under the heading "Classification of Sales and the Market Pool." This provision provides that the losses engendered in the disposal of the surplus be deducted from the established base price to be paid producers.

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Prior to the Agreement, the members of the associations of producers handled the entire surplus. Under this arrangement, non-member producers were able to receive Class I prices on a substantially larger proportion of their sales than were those producers who were members of associations. Consequently, a minority group received an advantage to the disadvantage of the majority of producers supplying the Los Angeles Sales Area.

The milk price war that prevailed in the Los Angeles market in July, 1932, is evidence that the surplus burden of the market must be borne by all producers. Losses incurred by members of the associations of producers at that time operated the surplus plant became so severe that in July, 1932, the associations refused to carry the entire surplus burden and closed the surplus plant, thus throwing an additional gallonage in excess of 30,000 gallons of milk upon the market, resulting in a marked decline in the prices received for milk by both producers and distributors. As pointed out hereinbefore, such price wars, in addition to causing marked financial losses on the part of both producers and distributors, also burden and effect the interstate and foreign commerce in dairy products.

C. Classification of sales and the market pool.

The foregoing considerations, discussed in connection with the price schedule, also furnish the justification for the classification of milk sales in accordance with ultimate use. In addition, the economic fact is that a

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specified quantity of milk retails for a higher price when sold as Class I (or Grade A) milk (fluid milk) than when sold as surplus milk (milk used in the manufacture of butter and other manufactured dairy products).

Some surplus production over and above the fluid sales in the market is inevitable during all seasons of the year. Moreover, milk production varies from day to day and from season to season upon individual farms and for the market as a whole. Sales and consumption of milk and cream, while varying less from season to season, nevertheless show marked variation from day to day and also to some extent from season to season. This variation extends to the individual delivery routes of each distributor causing "route returns" and "route shortages." The sales of milk and cream by the various distributors in the market in relation to each other are undergoing changes at all times. Under these conditions it is impossible for the individual producer or for any group of producers to correlate production to the fluid demand of a particular distributor or of the market as a whole. So important are these factors that if a distributor were free to order in advance his requirements for Class I milk he would average from 10 to 20 percent surplus. Therefore, it is impossible to avoid having a limited supply of surplus milk in the market at all times.

An outlet must be furnished for this surplus milk, and the burden of the surplus should be distributed fairly and equitably among the producers. As indicated above, the distributor must sell his manufactured milk products

in competition with manufactured milk products generally. Similarly, cream prices are subject to pressure from cream shipped in from distant cream producing areas, the price of which directly affects the prices at which distributors can sell the cream derived from the milk of producers in the milk shed.

If all milk were paid for on a flat price basis, the individual distributor would tend to restrict his purchases to his fluid requirements. A price high enough to compensate the producer for his relatively high cost of production would not be sufficient to pay the distributor for manufacturing butter and other products for sale under such competitive conditions, and might even encourage him to import his cream from beyond the borders of the milk shed. The burden of the surplus production would be shifted by the distributor to individual producers in a disproportionate manner, the distributor declining to accept milk from some producers while taking the entire quantity of others. Under such circumstances, the prices paid by distributors tend to become depressed toward the level of butter prices, without regard to quality or cost of production.

Classification of sales of milk in accordance with its ultimate use, enables the distributor to accept all milk delivered to him by producers by authorizing payment for milk used to produce cream and for manufacturing purposes at prices which are reasonably correlated with the competitive prices which the distributor must meet.

With sales of milk classified according to ultimate use, the market pool is required in order that each producer

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may be given a fair proportion of the fluid market. The price paid to each producer must be based upon the average sales and usings in the various classes of all distributors in the market. Otherwise, each producer would be paid according to the actual use made by the particular distributor to whom his milk was delivered, which would rarely coincide with the average use of all distributors in the market.

D. The base surplus plan.

The primary aim of the base surplus plan is to encourage production at a uniform level throughout the year, aiding in bringing about a closer seasonal adjustment of production to market needs. Normally, production varies substantially from month to month depending upon seasonal changes and production conditions, the normal period of high production being the months of April, May and June when pasturage is usually abundant. High production during these months is normally followed by correspondingly low production during September, October and November. Consumption also varies throughout the year but without appreciable relation to the variation in milk production. The base surplus plan provides an incentive to producers to keep their production at a uniform level throughout the year and compensates them for making the necessary adjustment, to the end that the market may be assured at all times of an adequate supply of milk suitable for fluid consumption. The established base assigned to each producer is related to the quantity of milk produced by him during the normally low production months.

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At the same time, by assigning to each producer a definite production quota representing the amount of milk for which he will be paid at the higher blended price, an equitable relation among producers is maintained. Each producer is given his fair share of the fluid market, represented by his established base, while the surplus production of each producer over and above his base is paid for at the surplus price. If the producer allows his average production to fall substantially below his base, his base will be adjusted downward.

Experience shows that this plan tends to accomplish the desired end. The fluctuation in production from month to month becomes less and less pronounced.

The classified price plan and the base surplus plan have also been in successful operation for a number of years in the following markets: Chicago, Philadelphia, Baltimore, Washington, Milwaukee and Detroit. The plan provided for in the License for the stabilization of the fluid milk market, the assurance to producers of a fair price for milk, and the securing of a uniform price to all producers by requiring all producers to bear their fair share of the surplus burden is thus not new or untried. The essential features of this plan have been incorporated in voluntary agreements entered into by associations of producers in many of the principal metropolitan areas during the past ten years. Such voluntary methods have not heretofore proved entirely successful for the reason that producers and distributors who did not voluntarily agree to the plan and were free to operate on an unrestricted basis undermined the position in the

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market of producers and distributors who were bound by the plan. It is of the essence of any plan for stabilization of the market in any milk shed that all producers and distributors supplying or distributing milk to such milk shed participate therein and be bound thereby.

E. The minimum wholesale, resale and retail price schedule.

The License provides for a schedule of minimum resale and retail prices. In certain cases, the establishment of such minimum wholesale prices is necessary: (1) to eliminate unreasonable price cutting which tends to lower the prices received by producers of fluid milk and in some cases to endanger the supply of milk needed to meet fluid requirements; and (2) to place all distributors and producers on an equitable, comparable basis.

The inclusion of the minimum price schedule in the License tends to prevent unreasonable price cutting, which is often resorted to by some distributors in order to secure a large volume of business in the hope of recovering the losses so engendered at some future time. Such unreasonable price cutting tends to demoralize the market and make impossible the maintenance of the fixed producer price, operating to the disadvantage of producers and distributors generally, and may in some cases endanger the milk supply by forcing out of business some producers and distributors necessary to supply normal fluid milk requirements. However, while the establishment of a schedule of minimum resale prices tends to eliminate unreasonable price cutting, it does not

prevent efficient distributors from selling at margins considerably below those prevailing among the less efficient distributors. The establishment of minimum resale prices therefore tends to bring about more efficient distribution of milk.

As was pointed out hereinabove, price wars, extensive price cutting, and other methods of destructive competition had resulted in a decidedly unstablized price structure in the Los Angeles Milk Market prior to the issuance of the License. Therefore, in order to eliminate such methods of destructive competition and to thereby stabilize the price structure in the Los Angeles Milk Market, it was necessary to establish the minimum wholesale, resale and retail price schedule. The prices so established allowed distributors to realize practically the same margins that prevailed prior to the issuance of the License.

VI. The Provisions of License for Milk, Los Angeles, Sales Area, License No. 57, Issued May 31, 1934.

The License is designed to accomplish the following purposes:

(1) To fix a fair and reasonable price which producers of milk shall receive for milk sold by them and to insure the receipt of such price by them. Inasmuch as milk sold by distributors for consumption as whole milk commands a higher price on the market than milk sold in the form of cream, which in turn commands a higher price than milk sold in the form of butter or other manu-

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factured products, said License classifies milk in accordance with the several uses made thereof and fixes a price to be paid to producers for each of the several use classifications depending upon the ultimate use actually made of such milk. The fixation of prices upon the basis of use made of milk by distributors benefits all distributors, since it permits them to pay a price for their milk which is correlated with the price received by them for such milk in the form in which it is sold. The price for each class of milk, fixed by said License, complies with the provisions of the Act in that it approaches the parity price of milk as defined by the Act, insofar as the current consumptive demand for milk in the Los Angeles Sales Area and the country at large permits.

(2) To assure to all producers a uniform price for their milk, irrespective of the actual use of such milk made by the particular distributor whom each producer supplies. Because of the provisions in said License, classifying the prices of milk purchased from producers on the basis of the ultimate use actually made of such milk by distributors, producers supplying an equal quantity of milk of the same quality to different distributors, would receive different prices for their milk if each distributor were to pay the producer supplying him on the basis of his individual use of milk. In order to avoid this inequitable result, and at the same time to require each distributor to pay for milk purchased by him only at prices determined on the basis of the actual use made of such milk by him, the License provides for an equalization pool which operates as follows: Each

distributor is required to report monthly the actual uses made by him of all milk purchased by him from producers. The average value per hundredweight of milk purchased by all distributors (on the basis of the use of such milk by all distributors) is then determined by dividing the total purchase price owing from distributors by the total quantity of milk purchased by them. The License requires each distributor to pay to producers supplying him with milk, on the basis of such average price. This results in requiring certain distributors to pay more for milk purchased by them than the use value of such milk to them, whereas other distributors pay less for the milk purchased by them than its use value to them. The License, therefore, further provides for an adjustment account whereby payments for milk by distributors are equalized on the basis of the actual use value to each distributor of the milk purchased by him. Thus each distributor, the value of whose milk (based upon his use thereof) is not as great as the average value of all milk used in the market (based upon the average use thereof by all distributors) is reimbursed by payments from other distributors, the value of whose milk (based upon their use thereof) is in excess of the average value of all milk used in the market.

(3) To eliminate unreasonable price cutting which tends to demoralize the milk market. The economic depression has reduced the consumptive demand for milk. Distributors in an effort to secure for themselves a larger share of the market, have resorted to cutting the resale price of milk, making impossible the maintenance of a

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fixed price to producers and thereby reducing the price paid producers for milk.

A. Cost of milk to distributors.

According to the provisions of the License, distributors are required to pay the following prices per pound of butterfat contained in milk purchased from producers, delivered f.o.b. distributor's plant in the Los Angeles Sales Area:

Class I—55 cents.

Class II—The average price per pound of 92-score butter at wholesale in the Los Angeles Market as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased, plus 40 percent of such amount, plus 12 cents.

Class III—The average price per pound of 92-score butter at wholesale in the Los Angeles Market as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased, plus 40 percent of such amount, plus 6 cents.

Class IV—The average price per pound of 92-score butter at wholesale in the Los Angeles Market as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased, plus or minus, as the case may be, ¼ cents for each one cent that such price is above or below 25 cents, plus 4 cents.

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The term "delivery period" means the period from the first to, and including, the last day of each month.

Class I milk means all milk sold or distributed by distributors as whole milk for consumption in the Los Angeles Sales Area.

Class II milk means all milk used by distributors to produce cream for sale or distribution by distributors as cream for consumption in the Los Angeles Sales Area.

Class III milk means all milk sold or used by distributors to produce ice cream and/or ice cream mix, for consumption in the Los Angeles Sales Area.

Class IV milk means the quantity of milk purchased, sold, used or distributed by distributors in excess of Class I, Class II and Class III milk.

The price set for Class I milk of $2.20 per hundredweight of 4 percent milk (or 55 cents per pound of butterfat) is somewhat lower than the June, 1934 parity price of $3.07 per hundredweight of Class I milk. The prices as set in the License tend to sustain and raise prices received by producers supplying milk to the Los Angeles market towards parity levels. However, there are certain economic considerations which impose limitations on the prices which may justifiably be set and maintained, thereby preventing an immediate increase in prices to the parity level.

Class I milk sold for consumption as milk must be produced under highly sanitary conditions in accordance

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with local health regulations. The cost of producing such milk is therefore substantially higher than the cost of producing milk used in the manufacture of butter, cheese, condensed and evaporated milk, and other manufactured milk products, and a higher price to the producer of such milk is economically justified. However, such prices must be maintained in a reasonable relationship to the prices received by producers of manufacturing milk. If a price for Class I milk were fixed at an unreasonably high figure above the prices received by producers for manufacturing milk, producers who had formerly produced milk for only manufacturing purposes would equip their farms for the production of high quality milk. This would tend to subject the fluid market to serious pressure through substantially increasing the market surplus, and would tend to result in a lower average price for all producers in the market.

The average prices paid producers in California for milk purchased by condenseries during 1933 and during the first five months of 1934, respectively, were as follows:

1933	$0.95 per hundredweight
First five months of 1934	.95
January	.80
February	.98
March	1.04
April	.96
May	.97

(Testimony of E. W. Gaumnitz)

The differential between the above prices and the price provided in the License for Class I milk represents (1) a fair and reasonable premium to compensate the producer for the additional costs of producing high quality milk, and (2) an allowance to compensate producers for the higher costs of transporting fluid milk, which is bulky and perishable, and (3) an allowance to compensate the producer for maintaining a relatively stable volume of production of high quality milk somewhat larger than the average volume actually sold as Class I milk in the market, this volume in addition to actual average sales being required to meet daily fluctuations in the demand for fluid milk. The price for Class I milk provided in the License is higher than that prevailing before the License was put into effect. The License was necessary in order to maintain higher prices, and to provide the machinery for further increasing such prices when economic conditions warrant such increases.

The Class II price applies to milk used by distributors to produce cream for consumption as cream, and is related directly to the wholesale price of 92-score butter at Los Angeles. The market for such milk, derived from the excess milk of local producers over and above the Class I requirements of the market, is subject to pressure from distant cream producing areas; for the cream equivalent of milk used to produce cream, by reason of its lesser bulk, can be profitably shipped into the Sales Area from distant producing areas. In order to maintain a reasonable share of the cream market for local producers, it is essential that the Class II price be main-

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tained at a level not unreasonably high in relation to the prices at which cream supplied by distant cream producing areas is available in the Sales Area. The prices received for cream in distant producing areas depend upon the prices of manufactured dairy products. Due to the fact that these products are readily storable and transportable, the price of milk for manufacturing purposes is set by national supply and demand factors outside of the scope of the Los Angeles License. It becomes necessary, therefore, to maintain Class II prices in the Los Angeles area in relationship with the price obtained by producers of manufacturing milk. Since the production and price of manufactured dairy products vary seasonally, it is necessary to allow Class II prices to vary rather than to be fixed throughout the year. By the formula method of computation, changes in the Class II prices are allowed in relationship to the price of manufactured products. In addition to the foregoing, the Class II price specified in the License allows the producer reasonable compensation for producing milk of a sufficiently high quality to meet the health requirements for cream in the Los Angeles Sales Area.

The prices of Class III milk, which is the milk used to produce ice cream and/or ice cream mix, and Class IV milk, which is the milk in excess of Class I, Class II and Class III sales in the market, are also related directly to the price of butter, since the manufactured products derived from such excess milk must be sold in direct competition with butter and other manufactured products, the prices of which are determined by national

supply and demand forces (due to the fact that such manufactured products are readily storable and transportable) outside of the scope of the License.

The foregoing considerations and competitive factors impose limitations upon the prices which may justifiably be fixed and maintained under the License. As prices of dairy products rise generally, the prices for Class I, Class II, Class III and Class IV milk will be increased and will further tend gradually to approach the parity price.

B. The minimum resale price schedule.

The necessity for including this schedule in the License has already been discussed in connection with License No. 17.

The resale prices specified in this License are reasonable, since (1) the margin between the prices received by the producer and the price paid by the consumer is materially lower than the actual margin prevailing in the Los Angeles Sales Area, and (2) the License provides that the schedule of minimum resale prices may be revised, provided it is shown that such prices are higher than is necessary to maintain the prices to producers.

The following table indicates the margin between prices received by producers and prices paid by consumers under the provisions of the minimum resale price schedule.

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Minimum Resale Prices

Distribution Unit	Wholesale Price (cents)	Price to Venders (cents)	Retail Wagon Price (cents)	Price to Farmers (cents)	Margin (Farmer to consumer) (cents)
Milk 4.0%					
Half pint	3	2	.....	1.2	1.8 whol.
1/3 quart	4	3	.....	1.6	2.4 whol.
Pint	5	4	6	2.4	3.6
Quart	8	6.5	9	4.7	4.3
Gallon	26	23	.....	18.9	7.9 whol.

The margins between prices received by producers and prices paid by consumers for milk, as prevailing in May, 1934 (prior to the License) and July, 1934, were as follows:

May, 1934

Distribution Unit	Wholesale Price (cents)	Price to Venders (cents)	Retail Wagon Price (cents)	Price to Farmers (cents)	Margin (Farmer to Consumer) (cents)
Milk 4.0%					
Half pint	.....	.....	.....	1.1	
Pint	.....	.....	.....	2.2	
Quart	6	8	10	4.4	5.6
Gallon	23	.....	.....	17.6	5.4 whol.

July, 1934

Milk 4.0%					
Half pint	.....	.....	.....	1.2	
Pint	.....	.....	.....	2.4	
Quart	8	9	11	4.7	6.3
Gallon	27.5-32	.....	.....	19.0	8.5-13.0 whol.

The amount by which distributors' margins under the schedule of minimum resale prices in the License are

below those actually prevailing in the Los Angeles market for July, 1934, is thus 2.0 cents per quart.

C. The classified price plan and the market pool.

(1) The adjustment features of the License.

The necessity for the classification of milk according to ultimate use and the requirement that each producer be paid upon the average sales and usings in the various classes of all distributors in the market has already been pointed out in connection with License No. 17. The requirement of this License that each producer be paid upon the basis of the average using of the entire market necessarily leads to further provisions relating to adjustments as between distributors. The adjustment features included in License No. 57 (see Exhibit A, Section B) are designed, with respect to the cost of milk to distributors, (1) to insure that Class I milk be drawn from sources nearest the market, thus effecting *economics* which will accrue to the benefit of producers; (2) to allow reasonable charges which will reflect the cost of transporting milk to the market, and (3 to prevent the use of unreasonable country station charges which could offset the benefits to producers of the price features of the License. These features of the License provide, moreover, with respect to equity among producers, (1) that the advantage of location of individual producers shall be recognized, and (2) that the economics mentioned above shall be reflected through the blended price for delivered bases.

(2) Classification and the market pool as applied to producer-distributors.

(Testimony of E. W. Gaumnitz)

The various provisions of the License are designed to treat all distributors and all producers in as equitable a manner as possible, therefore, the functions of production and distribution must be thought out separately, and where they are combined, special treatment must be provided in order to maintain this equality.

Each distributor who is also a producer is required to report to the Market Administrator the sales which represent his own production as well as the sales which represent the production of other producers. Such a distributor is exempt as to each delivery period (except the first three full delivery periods during which he sells or delivers milk as a new producer) from equalization adjustments if he handles only milk produced by himself and does not sell his surplus milk to other distributors or to manufacturing plants. The exemption is limited to an average daily volume of sales up to and including 20 pounds of butterfat, which amount is to be adjusted from time to time by the Market Administrator so as to approximate the average amount of Class I and Class II milk handled per retail route by all distributors in the Los Angeles Sales Area.

It is necessary to include in the market pool distributors who are also producers, because (1) if they were not included, it would give such distributors an advantage over other distributors, and/or (2) it would give such distributors, as producers, an advantage over other producers. This would be true because such a distributor would seek to dispose of his entire supply as Class I milk, which would result in either a higher price to him-

self as a producer or a wider margin to himself as a distributor. Distributors of this type handle a substantial proportion of the milk distributed in the Los Angeles Sales Area and if such distributors are given an advantage in the market, there will be a tendency for them to increase in numbers and in volume of business in the Sales Area. This would result in a tendency for additional producers to enter into the distribution of milk or additional distributors to enter into the production of milk in order to gain a similar advantage either as producers or as distributors. The surplus burden of the market, therefore, would be weakened accordingly.

The exemption granted distributors under the above conditions is for the purpose of reducing administrative difficulties insofar as possible, because the cost of operating the market pool and collecting and disbursing the adjustment funds per unit of volume is relatively large on small accounts.

D. The base surplus plan.

The necessity for an explanation of the base surplus plan, which is also included in License No. 57, has already been stated in connection with License No. 17.

VII. The Provisions of the Amendment to License No. 57 Effective August 22, 1934.

By an amendment to License No. 57, effective August 22, the price of Class I milk has been increased from 55 cents to 61 cents per pound butterfat. The increase is justifiable on the basis (1) that the prices of other dairy products, especially butter, have increased markedly since

(Testimony of E. W. Gaumnitz)

License No. 57 was issued, and (2) wide-spread drought has sharply curtailed feed supplies, thereby increasing the cost of production of milk, especially in the Los Angeles Area, since most of the dairy farms in this area are highly specialized and most of the feed for dairy *d*ows is purchased.

The minimum resale price schedule has been revised somewhat, but since the margins under the revised schedule and the schedule previously obtaining are practically the same, the justification set forth above is satisfactory.

The following table indicates the margin between prices received by producers and prices paid by consumers under the provisions of the original minimum resale price schedule:

Minimum Resale Prices

Distribution Unit	Wholesale Price (cents)	Price to Venders (cents)	Retail Wagon Price (cents)	Price to Farmers (cents)	Margin (Farmers to Consumer) (cents)
Milk 4.0%					
Half pint	3	2	.....	1.2	1.8 whol.
1/3 pint	4	3	.....	1.6	2.4 whol.
Pint	5	4	6	2.4	3.6
Quart	8	6.5	9	4.7	4.3
Gallon	26	23	.....	18.9	7.9 whol.

The following table indicates the margin between the prices received by producers and the prices paid by consumers according to the amended minimum resale price schedule:

(Testimony of E. W. Gaumnitz)

Minimum Resale Prices

Distribution Unit	Wholesale Price (cents)	Price to Venders (cents)	Retail Wagon Price (cents)	Price to Farmer (cents)	Margin (Farmer to Consumer) (cents)
Milk 4.0%					
Half pint	3.0	2.0	.....	1.3	1.7 Ws.
Pint	5.0	4.0	6.0	2.6	3.4
Quart	8.5	7.0	9.5	5.2	4.3
Gallon	29.0	25.0	.....	21.0	8.0 Ws.

STIPULATION OF COUNSEL

We agree that the foregoing narrative is a true and correct description and transcript in narrative form of all the evidence introduced at the hearing for the preliminary injunction and upon the motions to vacate and dissolve the preliminary injunction and to dismiss the proceeding in the above-entitled cause; the lodgment of said statement in the office of the Clerk and the notification to the appellees of such lodgment are hereby waived.

This day of October, 1934.

LEWIS D. COLLINGS
EDWARD W. SELBY
H. C. JOHNSTON
by L. D. COLLINGS
Solicitors for Plaintiffs.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney for the Southern District of California.

Clyde Thomas
CLYDE THOMAS,
Asst. United States Attorney

Mac Asbill
MAC ASBILL
Special Assistant to the Attorney General.

E. H. Whitcombe
E. H. WHITCOMBE
Ferrand & Slosson
FERRAND & SLOSSON,
Attorneys for Defendants.

ORDER APPROVING NARRATIVE STATEMENT OF THE EVIDENCE

The foregoing narrative statement is hereby approved and ordered filed as a part of the record for the purpose of the appeal herein, same being the narrative statement referred to in the stipulation and transcript of record herein filed by counsel.

This 30th day of October, 1934.

GEO COSGRAVE
United States District Judge.

[Endorsed]: Filed Oct 30, 1934 R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

[Title of Court and Cause]

No. 144-C-Eq.

STIPULATION

It is hereby stipulated by and between the parties to the above-entitled action that in preparing the record for appeal in said action the endorsements on all papers filed in the Clerk's office may be omitted with the exception of the filing endorsement of the Clerk, and that the title of court and cause may be eliminated from each paper filed, substituting therefor the words "title of court and cause" except on the Bill of Complaint, the order or decree of the court for preliminary injunction, and petition for appeal.

Dated: October 31, 1934.

Lewis D. Collings
Edward M. Selby
H. C. Johnston
by Lewis D. Collings
Attorneys for Plaintiffs.

Peirson M. Hall
Peirson M. Hall,
United States Attorney for the Southern District of California.

Clyde Thomas
Clyde Thomas,
Asst. United States Attorney

E. H. Whitcombe
E. H. Whitcombe
Ferrand & Slosson
Ferrand & Slosson,
Attorneys for Defendants.

[Endorsed]: Filed Nov 1, 1934 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 144-C-Eq.

ORDER ALLOWING ATTACHMENT OF COPY OF EXHIBIT TO PRINTED RECORD

Good cause appearing therefor, on motion of Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said district, it is hereby ordered that in the preparation of the record on appeal now being perfected from the preliminary injunction and order denying motion to dissolve the same, that Exhibit "A" of the original Bill of Complaint, being License No. 57 and Marketing Agreement, need not be printed but that the Government pamphlet publication thereof may be inserted in the printed transcript of record.

Dated: Oct. 31, 1934.

GEO. COSGRAVE
United States District Judge.

The above order is hereby consented to.

CURTIS D. WILBUR
United States Circuit Judge for the Ninth Circuit.

(ENDORSED): FILED NOV 5—1934. R. S. ZIMMERMAN, Clerk, by Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause]

IN EQUITY
No. 144-C

STIPULATION IN LIEU OF PRAECIPE

It is hereby stipulated by and between counsel for the respective parties hereto that the transcript of record on appeal to the United States Circuit Court of Appeals herein shall consist of the following:

1. Bill of Complaint filed on January 11, 1934, with exhibits thereto.

2. Motion for leave to file supplemental bill of complaint and notice of motion.

2-a. Minute Order of September 4, 1934.

3. Order to show cause and restraining order dated and filed August 9, 1934.

4. Supplemental bill of complaint with exhibits thereto.

5. Motion of Los Angeles Milk Industry Board, Richard Cronshey, William Corbett, David P. Howells, Geo. A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Beuchert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins and Ross Weaver, for an order dismissing the proceeding and notice of motion filed August 28, 1934.

6. Motion of Milk Producers, Inc., for an order dismissing the proceeding and notice of motion filed, August 28, 1934.

7. Motion of Harry W. Berdie for an order dismissing the proceeding and notice of motion filed August 29, 1934.

8. Objections of defendants, Anders Larson, H. C. Darger and Peirson M. Hall, filed September 1, 1934, to application of plaintiffs for a preliminary injunction and for leave to file supplemental bill of complaint.

9. Ruling of court on motions to vacate temporary restraining order, objections to allowance of supplemental bill of complaint and to dismiss proceedings filed September 7, 1934.

10. Preliminary injunction signed and filed on September 20, 1934.

11. Objections under Rule 44 to form of preliminary injunction.

12. Motion to dissolve preliminary injunction filed September 25, 1934, with notice of motion.

13. Motion to dismiss proceeding filed September 25, 1934, and notice of motion.

14. Minute Orders of October 1, 1934, and October 3, 1934, overruling motions to vacate preliminary injunction and to dismiss proceedings with exception to said orders.

15. Order amending Minute Order of October 3, 1934.

16. Petition for appeal.

17. Assignment of Errors.

18. Order allowing appeal.

19. Narrative statement of the evidence, stipulation of counsel, and order approving same.

20. Citation on appeal.

21. Order of court allowing insertion of License No. 17 in printed Transcript of Record.

22. This stipulation.

DATED: This 31st day of October, 1934.

LEWIS D. COLLINGS
EDWARD M. SELBY
H. C. JOHNSTON
by LEWIS D. COLLINGS
Solicitors for Appellees.

Peirson M. Hall,
PEIRSON M. HALL,
United States Attorney for the Southern District of California.

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

Mac Asbill
MAC ASBILL,
Special Assistant to the Attorney General.

E. H. Whitcombe
E. H. WHITCOMBE
Farrand & Slosson
FARRAND & SLOSSON,
Attorneys for Defendants.

[Endorsed]: Filed Nov. 1, 1934. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

CLERK'S CERTIFICATE

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing ..... pages, numbered 1 to ....., inclusive, to be the Transcript of Record in the above entitled cause, as printed by the Appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me, and contains full, true and correct copies of:

Citation on Appeal.

Bill of Complaint with Exhibits.

Notice of Motion to File Supplemental Bill of Complaint.

Motion for Leave to File Supplemental Bill of Complaint.

Minute Order of September 4, 1934.

Supplemental Bill of Complaint With Exhibits (Omitting Exhibits A and B Which appear in Original Bill).

Order to Show Cause and Restraining Order.

Motion of Los Angeles Milk Industry Board, et al., for Order Dismissing Proceedings.

Motion of Milk Producers, Inc., for Order Dismissing Proceedings.

Motion of Harry W. Berdie for Order Dismissing Proceedings.

Objections of Defendants Anders Larson, et al., to Application for Preliminary Injunction.

Ruling of Court on Motions to Vacate Temporary Restraining Order, etc.

Preliminary Injunction.

Objections Under Rule 44 to Form of Preliminary Injunction.

Motion to Dissolve Preliminary Injunction.

Motion to Dismiss Proceedings.

Minute Orders (2) Overruling Motions to Vacate Preliminary Injunction and to Dismiss Proceedings, With Exceptions Thereto .

Order Amending Order of October 3rd, 1934.

Petition for Appeal.

Assignment of Errors.

Order Allowing Appeal.

Narrative Statement of Evidence, Stipulation of Counsel, and Order Approving Same.

Stipulation Re: Diminution of Record.

Order of Court Allowing Substitution of License 17 (Printed Pamphlet) in Record.

Stipulation in Lieu of Praecipe.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States, for the Southern District of California, Central Division, this.....day of....., in the year of our Lord One Thousand Nine Hundred Thirty-Four, and of our Independence, the One Hundred and Fifty-ninth.

(SEAL) R. S. ZIMMERMAN,

Clerk of the District Court of the United States, in and for the Southern District of California.

By.....

Deputy Clerk.

No. 7657

In the United States Circuit Court of Appeals for the Ninth Circuit

HARRY W. BERDIE, ET AL., APPELLANTS

v.

CHARLES J. KURTZ, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

HAROLD M. STEPHENS,
Assistant Attorney General.

PIERSON M. HALL,
United States Attorney.

CARL McFARLAND,
MAC ASBILL,
A. H. FELLER,
Special Assistants to the Attorney General.

JEROME N. FRANK,
General Counsel,
Agricultural Adjustment Administration.

ARTHUR C. BACHRACH
Special Advisor to General Counsel,
Agricultural Adjustment Administration.

JOHN J. ABT,
Chief of Litigation Section,
Agricultural Adjustment Administration.

DONALD B. MacGUINEAS,
M. CAMPER O'NEAL,
Attorneys,
Agricultural Adjustment Administration.

INDEX

CITATIONS

Cases:

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7657

HARRY W. BERDIE, ET AL., APPELLANTS

v.

CHARLES J. KURTZ, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

The orders appealed from

This is an appeal from interlocutory orders entered on September 20, October 1, and October 3, 1934, by the District Court for the Southern District of California. The order entered September 20, 1934, temporarily enjoined appellants (defendants below) from enforcing or attempting to enforce as against the appellees, the Agricultural Adjustment Act (Title 7, U. S. C., Ch. 26) and two Milk Licenses issued by the Secretary of Agriculture, pursuant to section 8 (3) of that Act, and

from making any of the demands and committing any of the acts with relation to the appellees complained of in the original and supplemental bill of complaint (R. 254–260). The orders of October 1 and October 3, 1934, denied appellants' motions to dismiss appellees' original and supplemental bill of complaint and to vacate the temporary injunction entered September 20 as aforesaid (R. 270–273).

Sections of the Act here involved

The provisions of the Agricultural Adjustment Act here involved are as follows:

DECLARATION OF EMERGENCY

> That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act.

This language is immediately followed by a "Declaration of Policy" contained in section 2 of the Act. Briefly stated, this section declares it to be the policy of Congress (with certain stated limitations) to restore the farmers to purchasing power which they enjoyed in what the Act called the "base period", defined as August, 1909–July, 1914.

Three different methods for carrying out the declared policy are provided in section 8 of the Act, which reads in part as follows:

> SEC. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power—
>
> (1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments. Under regulations of the Secretary of Agriculture requiring adequate facilities for the storage of any nonperishable agricultural commodity on the farm, inspection and measurement of any such commodity so stored, and the locking and sealing thereof, and such other regulations as may be prescribed by the Secretary of Agriculture for the protection of

such commodity and for the marketing thereof, a reasonable percentage of any benefit payment may be advanced on any such commodity so stored. In any such case, such deduction may be made from the amount of the benefit payment as the Secretary of Agriculture determines will reasonably compensate for the cost of inspection and sealing, but no deduction may be made for interest.

(2) After due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect interstate or foreign commerce.[1] The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreements shall be deemed to be lawful; *Provided,* That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the par-

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[1] First sentence as amended by Public, No. 152, 73d Congress, approved April 7, 1934. As originally enacted this sentence read: "To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties."

ties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law. Any such person engaged in such handling without a license as required by the Secretary under this section shall be subject to a fine of not more than $1,000 for each day during which the violation continues.

The only provision of the Act involved in this case is section 8 (3).

The Los Angeles Milk Licenses

Pursuant to section 8 (3) of the Act, a License for Milk, Los Angeles Milk Shed, License No. 17, was issued by the Secretary of Agriculture on November 16, 1933 (pp. 44 et seq. of printed pamphlet following R. 32). This License was terminated by the Secretary pursuant to its terms on May 31, 1934 (R. 88), and at the same time the Secretary issued a License for Milk, Los Angeles, California, Sales Area, License No. 57, which has been in effect continuously since that date (R. 116–150).

Both Licenses are blanket Licenses and license *all distributors* engaged in distributing milk for consumption in the Los Angeles Sales Area to engage in business upon the terms and conditions therein provided (p. 47 of printed pamphlet following R. 32; R. 118). The Licenses require every distributor in the Los Angeles Sales Area to pay producers for their milk the minimum prices fixed in the License, and also fix a schedule of minimum resale prices below which distributors are forbidden to sell milk or cream at retail. All other provisions of the Licenses are merely a part of a plan to insure that producers shall receive fair prices for their milk. The appellees were formerly engaged in the distribution of milk and

cream for consumption in the Los Angeles Sales Area (R. 21, 94) and as such were licensed under both Licenses. The second License, issued on May 31, 1934, provides, among other things, that the failure of a distributor to fulfill all of his obligations under the original License shall constitute a violation of the second License (R. 123).

Appellant Berdie since February 26, 1934, has not been in the employ or connected with the Agricultural Adjustment Administration, United States Department of Agriculture (R. 296). The appellant Milk Producers, Inc.[2] is a corporation whose functions and duties under License No. 17 were to receive all milk in excess of the daily requirements for fluid consumption in Los Angeles, and to manufacture and dispose of this surplus milk in the form of manufactured dairy products (pp. 76–78 of printed pamphlet following R. 32). Its function in this capacity ceased with the termination of License No. 17. Appellants Cronshey, Corbett, Howells, Cameron, Lucas, Maharg, Marcus, Adamson, Day, Stabler, Buechert, Hibbert, Kuhrt, Platt, McOmie, Brice, Erwin, Read, Perkins and Weaver are members of the Los Angeles Milk Industry Board organized pursuant to License No. 17 (R. 5–7) and likewise have no official

[2] Milk Producers, Inc. is the successor to Producers Arbitration Committee, Inc., and all references in License No. 17 to Producers Arbitration Committee, Inc., are applicable to Milk Producers, Inc.

connection with License No. 57 now in force. Appellant Larsen is in charge of the Los Angeles office of the Field Investigation Section, Agricultural Adjustment Administration, United States Department of Agriculture and as such investigates violations of the Agricultural Adjustment Act and reports the same to the Department of Agriculture at Washington, D. C. (R. 304). Appellant Darger is the Market Administrator appointed by the Secretary to supervise the operation of License No. 57 (R. 59). Appellant Hall is the United States Attorney for the Southern District of California (R. 59).

Appellants' present status with respect to the licenses

By virtue of the authority vested in him by section 8 (3) of the Act, and after full compliance with the procedure provided for in General Regulations, Agricultural Adjustment Administration, Series 3, as amended, the Secretary of Agriculture, on July 28, 1934, found that appellees had violated License No. 17 in several respects and revoked the licenses of each of the appellees under License No. 57 (R. 151–170, 172–191, 193–213, 214–233).

On or about the effective date of the Orders of the Secretary of Agriculture revoking appellees' licenses, each of the appellees transferred to other persons or corporations that portion of their respective businesses having to do with the distribution, marketing, and handling of milk as distribu-

tors in the Los Angeles Sales Area and have not since such date engaged in the business of distributing milk in this area (R. 284, 287, 288–289, 290).

Theory of bill of complaint

Both the original and the supplemental bill of complaint alleged that the Agricultural Adjustment Act and the Los Angeles Milk Licenses are either unconstitutional and void or inapplicable to appellees and their businesses (R. 29–31, 104–108). The original bill was filed on January 11, 1934 (R. 48), and sought to enjoin appellants from taking any steps towards the revocation of appellees' licenses under license No. 17 and from making demands upon appellees to fulfill their obligations under this License (R. 32). No order based on the original bill was entered by the court,[3] and on July 28, 1934, as stated above, appellees' licenses were revoked by the Secretary of Agriculture. The supplemental bill of complaint, filed September 4, 1934 (R. 234), alleges the revocation of appellees' licenses by the Secretary (R. 100–101). It also alleges that the appellants who are members of the Los Angeles Milk Industry Board and appellant

[3] The affidavit of W. J. Kuhrt (R. 296) states that the District Court entered, without notice, a temporary restraining order, on January 15, 1934, and that said temporary restraining order was vacated on January 30, 1934. Neither this temporary restraining order nor the order vacating it appears in the Record. In any event, such orders are immaterial for the purposes of this appeal.

Milk Producers, Inc., demanded of appellees that they make certain payments and that the amounts demanded "were not calculated in accordance with the provisions" of License No. 17 (R. 65–81) and that appellees did not receive a fair or impartial hearing at the administrative proceedings held for the purpose of determining whether or not their licenses should be revoked (R. 110).

The supplemental bill contains every allegation of injury alleged in the original bill (R. 101–103), and since appellees' licenses have been revoked by the Secretary (the prevention of which was the principal object of the original bill), appellees' case and the orders of the District Court appealed from are based entirely on the supplemental bill. The original bill may, therefore, be ignored on this appeal.

The supplemental bill of complaint fails to make any reference whatever to the undisputed fact that at the time it was filed all of the appellees had theretofore disposed of all their property used in distributing milk in the Los Angeles Area and were no longer distributing any milk in the Los Angeles Area (R. 284, 287, 288–289, 290).

The allegations of the supplemental bill in and by which appellees attempt to invoke the equitable jurisdiction of the court are:

1. Appellant Darger will continue to demand that appellees make the payments required of them by License No. 57 (R. 98).

2. If the orders of the Secretary of Agriculture revoking the licenses of appellees are enforced, the assets of appellees will deteriorate and their good will will be destroyed (R. 109).

3. The fine for engaging in the business of distributing milk in the Los Angeles Sales Area without a license is so oppressive that appellees have no adequate remedy at law to challenge the validity of the Agricultural Adjustment Act and the Los Angeles Milk Licenses (R. 102).

4. Appellant Milk Producers, Inc., has threatened to and will institute civil proceedings in the State Courts to collect from appellees moneys demanded of them pursuant to License No. 17 (R. 103).

Position of appellants

It is the appellants' position that the question as to the constitutionality of the Agricultural Adjustment Act and the application of the Los Angeles Licenses to appellees was not properly before the District Court for adjudication because the case was moot at the time the injunction was entered, in that each of the appellees had transferred to other persons or corporations all of his or its respective property which had theretofore been employed in distributing milk in the Los Angeles Sales Area and had discontinued distributing milk in this area. Appellees thus had no property to be preserved by injunctive relief, and since they were no longer distributing milk in the Los Angeles

Sales Area they were in no danger of being subject to the fine provided by section 8 (3) of the Act for doing business without a license.

It is also appellants' position that, in any event, the order appealed from is erroneous insofar as it enjoins appellants from instituting or maintaining actions to collect from appellees moneys due under the License; and further, that the allegations of the supplemental bill are insufficient to justify the injunction against appellant Hall because of the failure to allege that he had threatened to prosecute appellees.

In the event that this Court should disagree with our contentions in this respect, it will become necessary to consider the constitutional questions which appellees have sought to raise. We shall, therefore, demonstrate that the regulation of appellees by the Los Angeles Milk License is an appropriate exercise of the Federal power to regulate interstate commerce and that the type of regulation adopted complies with the due-process clause of the Fifth Amendment.

Specification of errors

The District Court erred:

(1) In overruling the motion to dismiss the suit, because the case was rendered moot by appellees' action in disposing of their Los Angeles milk businesses and in ceasing to distribute milk in the Los Angeles Sales Area.

(2) In granting a preliminary injunction which stays proceedings in courts of the State of California, because, as to the suit pending in the State court, such injunction is forbidden by § 265, Judicial Code, Title 28, U. S. C. § 379. As to suits not yet instituted in the State courts, no danger of a multiplicity of suits existed which justified the intervention of a court of equity.

(3) In granting the preliminary injunction against appellant Hall, the United States Attorney, because the bill failed to allege that he had threatened to institute proceedings against appellees.

(4) In granting the preliminary injunction against other appellants who either have no official functions at all in connection with License No. 57 or are without power to enforce any of the penalties provided in the Agricultural Adjustment Act.

(5) In granting the preliminary injunction without requiring appellees to give security, because the giving of such security is mandatory under Title 28, U. S. C. § 382.

(6) In granting the preliminary injunction, because the case was moot and because, balancing the equities, the granting of such injunction was improvident.

(7) In holding that appellees are not subject to the terms of the Agricultural Adjustment Act and are not bound by the provisions of the Los Angeles Milk Licenses, because the application of the Act and the Licenses to appellees is valid under the

Commerce Clause and the due process clause of the Fifth Amendment.

(8) In holding that the Agricultural Adjustment Act and the Los Angeles Milk Licenses are not valid regulations of the milk businesses theretofore conducted by the appellees, because the application of the Act and the Licenses to appellees is valid under the Commerce Clause and the due process clause of the Fifth Amendment.

ARGUMENT

I

The Bill of Complaint should have been dismissed because the case was moot at the time the injunction was entered

Prior to the issuance of the preliminary injunction in this case, there were presented to the District Court four affidavits, one executed by appellee Kurtz and three executed by officers of the appellee corporations (R. 284–291). These four affidavits were filed by the appellees in response to affidavits previously filed by some of the appellants stating that on or about July 30, 1934, and subsequent to the revocation of their licenses by the Secretary of Agriculture, all of the appellees had transferred to other persons or corporations all their respective property which appellees had theretofore employed in distributing milk in the Los Angeles Sales Area, and that appellees were no longer distributing any milk or cream whatever in such sales area (R. 298, 300). Each of appellees' affidavits

stated, with respect to the particular appellee which it concerned, that upon the revocation of his or its license by the Secretary, the appellee had so disposed of all his or its property theretofore used in distributing milk in the Los Angeles Area. These affidavits also affirmed that appellees had taken this action in order to avoid being subject to the penalty provided by the Agricultural Adjustment Act for distributing milk in the Los Angeles Sales Area without a license. Appellees' affidavits further stated that they intended to resume the business of distributing milk in the Los Angeles Sales Area as soon as they could do so without being threatened with such penalty. Thus it appears from appellees' own affidavits that at the time the orders appealed from were entered, not one of them was distributing milk in the Los Angeles Sales Area (R. 284, 287, 288–289, 290).

It should be noted that appellees' supplemental bill was filed on September 4, 1934, *after* appellees had ceased distributing milk in the Los Angeles Sales Area (R. 239). Yet the supplemental bill failed to disclose to the District Court this fact, which had a vital bearing upon appellees' case. Appellees' admission that they were no longer distributing milk in the Los Angeles Area was made only after the disclosure of this fact to the court by affidavits filed by appellants. Under the circumstances, appellees' failure to make this disclosure in their supplemental bill was an imposition upon the District Court.

Nevertheless, the District Court was apprised of this fact before the entry of the orders appealed from (R. 255). Appellees' fundamental purpose in maintaining this suit is to obtain an adjudication of their alleged right to distribute milk in the Los Angeles Sales Area free from the conditions of the Milk Licenses. Yet at the time these orders were entered appellees had abandoned such business. Under these circumstances the case was clearly moot, and the District Judge erred in refusing to dismiss the bill of complaint. Since appellees were not distributors of milk in the Los Angeles Sales Area at the time the orders appealed from were entered (and as far as appears from the record, are not distributing milk in Los Angeles at the present date) the Milk License could not possibly apply to them and appellees could not possibly be subject to the penalty of $1,000 a day for distributing milk in the Los Angeles Sales Area without a license. Appellees, by their own voluntary action, terminated the existence of any issues between the parties to this cause and eliminated any subject matter upon which the order of the District Court could operate. Hence the case was moot prior to the entry of the order appealed from. The cause should be remanded to the District Court with instructions to dismiss the bill of complaint.

Mills v. *Green,* 159 U. S. 651, involved a bill in equity to restrain a supervisor of registration from continuing illegal registration for voting at a cer-

tain election. Pending an appeal, the election was held. The Supreme Court held that the case had become moot, and stated:

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. * * * If the intervening event is owing, *either to the plaintiff's own act,* or to a power beyond the control of either party, the court will stay its hand. (Italics ours.)

And the Supreme Court has held that when the plaintiff, during the course of litigation, disposes of property the protection of which was the object of the suit, he thereby renders the case moot. Thus in *Brownlow* v. *Schwartz,* 261 U. S. 216, involving a petition by a property owner for a writ of mandamus to compel a building inspector to issue a building permit, the plaintiff, pending litigation, sold the property for which she was seeking to obtain the building permit. The Supreme Court remanded the cause with instructions to dismiss the petition for mandamus, on the ground that the case had become moot:

> It thus appears that there is now no actual controversy between the parties—no issue on the merits which this Court can properly decide. The case has become moot for two

> reasons: (1) because the permit, the issuance of which constituted the sole relief sought by petitioner, has been issued and the building to which it related has been completed, and (2) because, the first reason aside, *petitioner no longer has any interest in the building and therefore has no basis for maintaining the action.* This Court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. * * *
>
> It is urged that the permit was issued by the Inspector of Buildings only because he believed it was incumbent upon him to comply with the judgment of the Court of Appeals and avoid even the appearance of disobeying it. *The motive of the officer, so far as this question is concerned, is quite immaterial. We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate.* The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance. (Italics ours.)

That case is entirely analogous to the case at bar, for the only theory on which appellees' pleadings may be said to state a case within the jurisdiction of a court of equity is that their businesses of distributing milk in the Los Angeles Sales Area will be irreparably injured if injunctive relief is not granted them. But since appellees have voluntarily disposed of such businesses they can no longer

have any interest in protecting that property. To paraphrase the language of the Supreme Court in the *Brownlow* case, the motive of appellees, so far as this case is concerned, is quite immaterial. This Court is interested only in the indisputable fact that appellees' action, however induced, has left nothing to litigate.

And see *Heitmuller* v. *Stokes,* 256 U. S. 359, in which the Supreme Court held that a suit to recover possession of certain premises was rendered moot by the action of the plaintiff in selling the premises pending the litigation.

Appellees cannot avoid this result of their action by alleging in their affidavits that they discontinued distributing milk in the Los Angeles Sales Area only because they feared the penalty provided by section 8 (3) of the Act and would resume their businesses as soon as an adjudication of this cause will be obtained (R. 284, 287, 289, 290–291). Appellees' motives in this respect are immaterial. The fact remains that the controversy between the parties no longer exists, and did not exist when the orders appealed from were granted. Matters of convenience or exigency cannot confer upon the courts jurisdiction to determine a moot case.

In *California* v. *San Pablo, etc., R. R.,* 149 U. S. 308, the State brought suit against the railroad to recover certain taxes. Pending litigation these taxes were paid under a stipulation of the parties that the losing party in the trial court would take

the case to the Supreme Court and that the decision there obtained should govern the parties in disposing of several other pending suits of a similar nature. Nevertheless the Supreme Court held that payment of the taxes had rendered the case moot and that stipulation by the parties could not confer upon the court jurisdiction to decide a moot question (p. 314):

> The court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty of the court in this regard.

The allegations in appellees' affidavits to the effect that they will again engage in distributing milk in the Los Angeles Sales Area, when the threat of the penalty provided by the Act for doing business without a license has been removed (presumably by a favorable adjudication of this cause) do not prevent the case at bar from being moot. It is not the function of an injunction suit to obtain a judicial determination of legal rights or liabilities with respect to a problematical set of facts which may exist at some uncertain future date. Thus, in *United States* v. *Hamburg-American Co.*, 239 U. S. 466, the Government brought a bill against British

and German Steamship Companies to prevent the execution of an agreement in violation of the Sherman Anti-Trust Act. Pending litigation the agreement was dissolved by the World War. The parties desired, nevertheless, an adjudication of the validity of the agreement, on the ground that on the cessation of war the agreement would probably be revived. The Supreme Court held that this element in the case did not prevent its becoming moot because of the war and stated at page 475:

> * * * it is urged in view of the character of the questions and the possibility or probability that on the cessation of war the parties will resume or recreate their asserted illegal combination, we should now decide the controversies in order that by operation of the rule to be established any attempt at renewal of or creation of the combination in the future will be rendered impossible. But this merely upon a prophecy as to future conditions invokes the exercise of judicial power not to decide an existing controversy, but to establish a rule for controlling predicted future conduct, contrary to the elementary principle which was thus stated in *California* v. *San Pablo & Tulare R. R.*, 149 U. S. 308, 314.

In the light of these cases it seems unquestionable that the case at bar was rendered moot by the action of the appellees in disposing of their businesses of distributing milk in the Los Angeles Sales Area. This fact was apparent to the Court below

when it entered the orders appealed from, and it should have dismissed the bill of complaint.

It is well settled that under such circumstances this Court will remand the case with directions to dismiss the bill of complaint:

> *United States* v. *Anchor Coal Co.* 279 U. S. 812,
> *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360,
> *Brownlow* v. *Schwartz,* 261 U. S. 216.

II

The order appealed from, insofar as it enjoins appellants from instituting or maintaining actions to collect from appellees moneys due under the Licenses, is erroneous

Appellees' supplemental bill of complaint alleges that on or about July 17, 1934, appellant, Milk Producers, Inc., instituted a suit in the Superior Court of the State of California, for the County of Los Angeles, against appellee, Lucerne Cream & Butter Company, to collect moneys claimed to be owing appellant, Milk Producers, Inc., by virtue of the provisions of License No. 17 (R. 103). The preliminary injunction makes reference to this suit filed in the State court (R. 256) and enjoins appellants from—

> collecting or attempting to collect from plaintiffs, or any of them, any of the sums of money demanded by defendants, or any of them under the terms and provisions of said License Nos. 17 and 57, either by civil or

> criminal proceedings or otherwise; or from commencing, prosecuting or maintaining any action against any of the defendants for the collection of any of said sums (R. 259).

This order enjoining appellant, Milk Producers, Inc., from maintaining its pending action in the State court is in direct contravention of § 265, Judicial Code, Title 28, U. S. C., § 379, which provides:

> The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

Assuming for the moment the correctness of appellees' contention that the Los Angeles Milk Licenses may not constitutionally be applied to them, and that hence if judgment were obtained against appellee, Lucerne Cream and Butter Company, in the suit in the State court, such judgment would violate appellee's rights under the Federal Constitution, this section of the Judicial Code nevertheless prevents the District Court from enjoining the prosecution of that suit.

In *Essanay Film Co.* v. *Kane,* 258 U. S. 358, a bill was filed in a Federal District Court to enjoin the defendant from prosecuting a suit which he had instituted in a State court against the plaintiff in the suit in the Federal Court, on the ground that jurisdiction of the defendant in the suit in the State court was based on a State statute which violated

the due process clause of the Fourteenth Amendment. Nevertheless, the United States Supreme Court held that § 265, Judicial Code, forbade the Federal Court from enjoining the maintenance of the suit in the State court. The Supreme Court said at page 361:

> That appellant's objection to the action sought to be restrained rests upon a fundamental ground and one based upon a provision of the Constitution of the United States, does not render the effort to stay proceedings in the state court any the less inconsistent with § 265, Judicial Code. That section would be of little force did it not apply to cases where, save for its prohibition, good ground would exist for enjoining the prosecution of a pending suit. And, as to the federal question involved, Congress at all times, commencing with the first Judiciary Act (September 24, 1789, c. 20, § 25, 1 Stat. 73, 85), has maintained upon the statute book such provisions as it deemed needful for reviewing judicial proceedings in the state courts involving a denial of federal rights, but has confined them to a direct review by this court, and deferred this until final judgment or decree in the state court of last resort. At the same time, since 1793, the prohibition of the use of injunction from a Federal court to stay proceedings in a state court has been maintained continuously, and has been consistently upheld.

This Court has been careful to require the district courts in this Circuit to comply with § 265, Judicial Code. See *Ke-Sun Oil Co.* v. *Hamilton,* 61 Fed. (2d) 215 (C. C. A. 9th Cir. 1932) and *Russell* v. *Detrick,* 23 Fed. (2d) 175 (C. C. A. 9th Cir. 1927). None of the exceptional situations which permits Federal courts to enjoin the maintenance of actions in State courts despite § 265, Judicial Code (mentioned by this Court in *Russell* v. *Detrick,* 23 Fed. (2d) 175, at 178), was present in the case at bar. And see *Honolulu Oil Corporation, Ltd.* v. *Patrick,* 71 Fed. (2d) 654 (C. C. A. 9th Cir.).

Nor do appellees' pleadings contain any allegations sufficient to justify the order of the Court below enjoining appellants from instituting any other suits to collect from appellees moneys due by virtue of the provisions of the Licenses. It is not alleged that appellees, if forced to defend any such suit, could not freely present and establish in that proceeding any defenses they may have, constitutional in nature or otherwise. Appellees have attempted to state a case of equitable jurisdiction in this respect by pleading their conclusion that they are threatened with a multiplicity of suits (R. 111). But pleading such a conclusion does not suffice; the rule is elementary that one who relies on this basis of equitable jurisdiction must allege facts from which the court may conclude that a multiplicity of suits is in fact threatened. In addition to the suit now pending in the State court against appel-

lee Lucerne Cream and Butter Company, each of the other appellees cannot possibly be subjected to more than one suit by appellant, Milk Producers, Inc., because of the fact that money owed by them to Milk Producers, Inc. under License No. 17 has accrued in full and no such further obligations can accrue, since License No. 17 has been terminated (R. 88). None of the appellees would have any interest in any such suit instituted against appellees other than himself. In the light of these facts it seems clear that appellees' pleadings fail to show that they are threatened with any multiplicity of suits which justifies equitable relief.

We submit, therefore, that the District Court erred in enjoining appellants from instituting or prosecuting actions against appellees to collect from appellees moneys due under the Licenses.

III

The bill of complaint fails to state any cause of action against appellant Hall, because of its failure to allege that he had threatened to enforce the act or the Los Angeles Licenses against appellees

Appellees' only allegation with reference to appellant Pierson M. Hall, United States Attorney for the Southern District of California, is that "plaintiffs and each of them are informed and believe and therefore *allege on such information and belief,* that defendant Pierson M. Hall as United States District Attorney for the Southern District

of California intends to and will institute proceedings against said plaintiffs and each of them", to enforce the Secretary's orders revoking appellees' licenses and to impose upon appellees the fine provided by section 8 (3) of the Agricultural Adjustment Act for doing business without a license (R. 110). This allegation, made on information and belief, is clearly insufficient to justify the preliminary injunction against appellant Hall. Appellees merely allege an "intention" in the mind of appellant Hall, without disclosing by what means appellees were informed of this intention. It does not appear that appellant Hall has ever stated to anyone that he intends to and will proceed against appellees in any manner whatsoever. It is, therefore, obvious that this allegation in the bill is a purely formal one and is not intended to state that appellant Hall has ever actually threatened to institute any proceedings against appellees. In this respect it should be noted that the preliminary injunction contains no recital that appellant Hall had ever made any threats, or otherwise indicated an intention to proceed against appellees (R. 254–260).

An injunction to restrain a public official from enforcing an allegedly unconstitutional statute will not lie unless it is alleged and proved that such official has actually threatened to take steps to enforce the statute.

The United States Supreme Court has squarely held that a bill to enjoin a public official from en-

forcing a statute fails to state a case unless it alleges that the public official has actually threatened to enforce the statute. *Ex Parte La Prade,* 289 U. S. 444, involved a bill in equity to enjoin the Attorney General of Arizona from enforcing an Arizona statute which provided that any railroad running trains of more than 70 freight cars or 14 passenger cars within the State should be liable to a penalty of not more than $1,000 for each offense, to be recovered by the Attorney General of Arizona. The Supreme Court granted a writ of mandamus requiring the three-judge federal court before which the suit was pending to dismiss the suit, and said at page 458:

> Plaintiffs did not allege that petitioner (the Attorney General) threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it.

This decision squarely controls the case at bar. The District Court should have dismissed the case as to appellant Hall, because of the failure of the bill of complaint to allege that he had threatened to institute proceedings against appellees to enforce the Los Angeles Licenses or the Agricultural Adjustment Act.

Furthermore, the verified allegations "on information and belief" in the bill are of insufficient probative value to justify the issuance of a preliminary injunction. This is a well-settled rule of equity practice, and it is especially applicable to a suit to enjoin a public official from acting in his official capacity. In *Behre* v. *Anchor Ins. Co.,* 297 Fed. 986 (C. C. A. 2nd Cir.), the Circuit Court of Appeals vacated a preliminary injunction granted by the District Court and said, at page 990:

> In this case the allegation of the bill is that the plaintiffs "believe and aver" that the defendant intends to transmit the fund abroad. In the equity courts allegations upon information and belief, unsupported by proof, are insufficient to sustain an injunction.

Other cases holding that an allegation made on information and belief is insufficient to justify the trial court in issuing a preliminary injunction are *Moore* v. *New York Cotton Exchange,* 296 Fed. 61, 73 (C. C. A. 2nd Cir.), affirmed, 270 U. S. 593; *Brooks & Hardy* v. *O'Hara Bros.,* 8 Fed. 529 (C. C. D. Ia.).

On the authority of *Ex Parte La Prade,* 289 U. S. 444, and the other cases cited above, it is clear that the District Court erred in enjoining appellant Hall, since neither appellees' pleadings nor proof were sufficient to show that appellant Hall had ever threatened to institute any proceedings against them.

IV

The preliminary injunction is too broad in that it enjoins appellants who either have no official functions at all in connection with License No. 57 or have no power to enforce any of the penalties provided in the Agricultural Adjustment Act

The court below enjoined all the defendants. This injunction is obviously too broad. Appellant Berdie, since February 26, 1934, has not been in the employ or connected with the Agricultural Adjustment Administration (R. 296). The functions and duties of appellant Milk Producers, Inc., under License No. 17 (pp. 76–78 of printed pamphlet following R. 32) ceased with the termination of License No. 17. Appellants Cronshey, Corbett, Howells, Cameron, Lucas, Maharg, Marcus, Adamson, Day, Stabler, Buechert, Hibbert, Kuhrt, Platt, McOmie, Brice, Erwin, Read, Perkins and Weaver are members of the Los Angeles Milk Industry Board organized pursuant to License No. 17 (R. 5–7) and have no official connection with License No. 57. Clearly, no injunction should have been issued against any of the appellants mentioned in this paragraph since none of them had any functions to perform in connection with License No. 57.

Two other appellants do perform functions in connection with License No. 57. Appellant Larsen is in charge of the Los Angeles office of the Field Investigation Section, Agricultural Adjustment Administration, and, as such, investigates violations of the Agriculture Adjustment Act and re-

ports the same to the Department of Agriculture (R. 304). Appellant Darger is the Market Administrator appointed by the Secretary of Agriculture to supervise the operation of License No. 57 (R. 59). But neither appellant Larsen nor appellant Darger has any power to enforce the penalties provided for in the Act. That power resides solely in appellant Hall as United States Attorney acting under the direction of the Attorney General. See *Federal Trade Commission* v. *Claire Furnace Company,* 274 U. S. 160; *Yarnell* v. *Hillsborough Packing Co.,* 70 Fed (2d) 435 (C. C. A. 5th Cir. 1934).

Thus an injunction could be issued only against one of the appellants, namely, appellant Hall and as we have previously shown the injunction was erroneous even as to him, since the bill failed to allege sufficiently a threat to enforce the statute. It is submitted that even if this Court should find that the injunction was properly granted as against appellant Hall, it was nevertheless improper to enjoin the other appellants, and that the cause should be remanded to the Court below with instructions to dissolve the injunction as against such appellants, and that costs should be taxed against the appellees. *Elizabeth* v. *American Nicholson Pavement Company,* 131 U. S. Appendix cxlviii, Cf. *Dollar S. S. Lines, Inc.* v. *Merz,* 68 F. (2d) 594 (C. C. A., 9th Cir., 1934).

V

The issuance of the preliminary injunction without requiring appellees to give any security was in violation of Title 28, U. S. C., § 382

In issuing the preliminary injunction in this case the District Court failed to require appellees to give appellants security against any damages which they may incur because of the erroneous issuance of the injunction. Title 28, U. S. C., § 382 makes the giving of such security mandatory. That section provides:

> Except as otherwise provided in section 26 of Title 15, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

The failure to comply with this provision of the Statutes is reversible error. See *Robinson* v. *Benbow,* 298 Fed. 561 (C. C. A., 4th Cir.).

The failure to require appellees to give security upon the issuance of the preliminary injunction was particularly prejudicial to appellants in this case. For the preliminary injunction enjoins appellants from prosecuting any suits to collect moneys claimed to be owed them by appellees by virtue of the provisions of the Licenses (R. 259), although

in the suit which appellant, Milk Producers, Inc., has instituted against appellee, Lucerne Cream and Butter Co., in the State court it is claimed that appellee, Lucerne Cream and Butter Company, owes over $18,000 by virtue of the provisions of License No. 17 (R. 302–303). It is claimed that the total obligations of all the appellees to appellant, Milk Producers, Inc., amount, in the aggregate, to $52,000 (R. 303). Yet appellees by their own admissions (R. 284, 287, 288–289, 290) have transferred to other persons or corporations all of their property which they formerly used in distributing milk in the Los Angeles Area. This conduct of appellees obviously renders difficult, and perhaps impossible, the collection by appellant, Milk Producers, Inc., of any amount of money which the appellees may ultimately be found to owe it. Under such circumstances appellant, Milk Producers, Inc., was greatly prejudiced by the action of the District Court in enjoining it from proceeding to collect this money from the appellees, without giving it the security to which it was entitled under the Statute.

Therefore the preliminary injunction should be vacated because of the failure of the District Court to require the giving of security, in compliance with Title 28, U. S. C. § 382.

VI

It was improvident to grant a preliminary injunction under the circumstances of the case

Because of the public interest involved in the continued operation of the Los Angeles Milk License, as compared with the relative insignificance of appellees' needs for a preliminary injunction, it was improvident to grant this relief. The regulation of markets for milk distributed in the current of interstate commerce, as it is done by the License here involved, is a principal method of effectuating the declared policy of Congress to remove obstructions to the normal currents of such commerce caused by the existing disparity between the prices that farmers obtain for their products and the prices that they must pay for industrial products. To permit a few milk distributors operating in the Los Angeles Sales Area to enjoin the enforcement of the License as against them is to destroy the entire marketing plan, for it is obvious that the most just and efficient plan for stabilization of a market cannot function if even a small group in the industry is permitted to disregard the plan.

The great public interest involved in the execution of an important Federal law is not to be lightly disregarded in granting a preliminary injunction when the unconstitutionality of the law is, at most, doubtful. To enjoin the enforcement of the Act for even a temporary period of time is

to inflict upon the public a serious and irreparable injury, if the law is finally determined to be constitutional.

As Judge Learned Hand stated in *Dryfoos* v. *Edwards,* 284 Fed. 596 (D. C. S. D. N. Y., affirmed 251 U. S. 146), a suit to restrain enforcement of the War-time Prohibition Act:

> The damages done by an injunction meanwhile cannot be measured in money, as in the case of *Cotting* v. *Kansas City Stockyards,* (C. C.), 82 Fed. 857. *Here is a question of national public policy,* of allowing the sale of *what the constituted authorities apparently regard as injurious to the public,* or to so much of it is they have the right to consider. *To annul their will, if only for a season, is to do an injury which is, to say the least, as irreparable, if the laws be valid,* as to prevent the plaintiffs from selling intoxicants for the same period, if they are not. *In all the books we are told that to declare a statute unconstitutional we must be assured beyond question that it is such. A temporary stay now is a declaration for a time that it is unconstitutional; it is to dispense with the statute till the case be finally decided.* Assuming that I may do so, there seems to be *no proper reason for exercising the power.* (Italics ours.)

See the statements of this same proposition in *Hurley* v. *Kincaid,* 285 U. S. 95, 104n and in *Railroad Commission* v. *Central of Georgia Ry. Co.,* 170 Fed. 225 (C. C. A. 5th Cir.)

And so here; to annul the declared will of Conress even temporarily was to inflict upon the public an irreparable injury far greater than any that might conceivably have befallen appellees by the denial of the temporary injunction.

In this connection, the attention of the court is called to the thoroughly established proposition that there is a strong presumption in favor of the constitutionality of an Act of Congress (see *Erie R. R. Co.* v. *Williams,* 233 U. S. 685), that the burden of demonstrating beyond question the unconstitutionality of the Agricultural Adjustment Act was on appellees (see *Mountain Timber Co.* v. *Washington,* 243 U. S. 219), and that the courts will not declare a statute unconstitutional unless its unconstitutionality is demonstrated beyond all reasonable doubt (see *O'Gorman & Young* v. *Hartford Ins. Co.,* 282 U. S. 251). This proposition applies with even greater force to a hearing upon an application for a preliminary injunction, as here, when the court does not have the advantage of a full hearing in reaching its conclusions.

We respectfully submit that, under all the circumstances of the case, the granting of a preliminary injunction by the court below was beyond the scope of its discretion and improvident, and that the preliminary injunction should be dissolved.

VII

Application of the Agricultural Adjustment Act and the Los Angeles Milk Licenses to appellees is a proper exercise of the Federal power to regulate interstate commerce

We contend that the Court below should have dismissed the bill of complaint and denied the motion for a preliminary injunction on the basis of the propositions of law discussed above and that hence there was no occasion for that Court to pass upon the constitutional issues which appellees attempted to raise in their pleadings. If this Court should, however, concur in the conclusions of the District Court on the preliminary questions of law, it will become necessary to consider the constitutionality of the application of the Los Angeles Milk Licenses to appellees.

The Court below held that the business of appellees in distributing milk in the Los Angeles Sales Area is not subject to regulation because such business is conducted entirely within the State of California and is, therefore, not interstate commerce. In so holding, the District Court ignored the contentions made by appellants below and which will be repeated here. We concede that the appellees do not distribute any milk outside of the State of California. *We admitted before the trial court and admit here that the business of appellees is in itself purely intrastate in character.* It is our position that the Federal Government has power under the

Commerce Clause to regulate the business of distributing fluid milk in the Los Angeles Sales Area because practices in the distribution of such milk existed in the Los Angeles Milk Market which directly burdened and affected interstate commerce in dairy products, and that the regulation of the distribution of milk in such intrastate markets as Los Angeles is essential to the raising of the prices received by farmers for the milk which is converted into those dairy products.

We shall demonstrate that (A) all of the milk distributed in the Los Angeles Sales Area is in the current of interstate commerce, and hence the distribution of milk by appellees may be regulated under the Federal Commerce Clause, (B) fixing the purchase price of milk which is in the current of interstate commerce is a proper regulation of interstate commerce, and (C) the purpose of the Agricultural Adjustment Act and the Los Angeles Milk Licenses in fixing the price to be paid to farmers for milk, is to increase the national flow of interstate commerce.

A. All of the milk distributed in the Los Angeles Sales Area is in the current of interstate commerce, and hence the distribution of milk by appellees may be regulated under the Federal Commerce clause

It is our contention at this point that the power granted the Federal Government by the Commerce Clause of the Constitution extends to the regulation of the minimum price at which distributors may purchase milk from producers for distribution

in the Los Angeles Area, although the particular distributors regulated by the Los Angeles Licenses do not themselves handle milk or dairy products which physically move in interstate commerce. This regulation is justified because the producer's price of fluid milk distributed in the urban markets of the country, of which Los Angeles is one, has a direct and immediate effect upon the vast movement of butter, cheese, and other dairy products in interstate commerce. Without such regulation it would be impossible to accomplish one of the chief purposes of the Agricultural Adjustment Act with respect to the dairy industry—the raising of the price received by the farmer for the milk which moves in interstate commerce in the form of dairy products.

The greater part of all the milk produced in the United States is consumed, not in the form of fluid milk and cream, but in the form of dairy products, such as butter and cheese, which are processed from milk. Over 58% of all the milk produced in this country (exclusive of milk consumed directly on farms) is manufactured into such dairy products (R. 323–324). Because these dairy products can be easily stored and readily transported, the costs of distributing them are relatively low, and therefore it is economical to process these products in certain localized areas from which they are transported throughout the entire nation for consumption (R. 326). By far the greater amount

of all so-called "manufacturing milk", i. e., milk produced in the United States and used exclusively for processing into butter, cheese, evaporated milk and other milk products, is produced in a few Mid-Western States and in New York (R. 325–326). Butter and other dairy products manufactured in these few states are transported to every state in the Union for consumption (R. 325).

Because of the economy with which dairy products may be transported long distances, the movement of dairy products throughout the nation is highly sensitive to price fluctuations at the markets, and the ready movement of dairy products between markets in all sections of the country in response to price fluctuations tends to establish a national price for dairy products which varies as between different localities only by relatively small differentials in the cost of transportation. (R. 326–327, 341; Figure 3, following R. 343. For an explanation of this and other charts in the record, referred to below, see R. 342).

It is apparent that the Los Angeles market plays an important part in this nation-wide flow of dairy products in interstate commerce, for in each of the last four years, over 60% of the butter and over 85% of the cheese received at Los Angeles were produced outside of California (R. 351–354).

In order to appreciate the direct and vital effect which conditions in the marketing of fluid milk in Los Angeles and the other urban markets through-

out the country have had upon this great interstate movement of dairy products, and upon the price which the farmer receives for the milk which goes into those products, a detailed explanation of the nature of the dairy industry is essential.

In addition to and distinct from the milk which is produced in certain areas in this country expressly for the manufacture of butter and cheese and other dairy products (discussed above), it is well known that practically every large municipality in the country is the center of a localized area in which milk is produced for consumption as fluid milk and cream. Such milk is generally referred to as "market milk."

The interrelationships which exist between the various usages of milk are such that fluctuations in the producer's price of market milk have a direct and immediate effect on the price received by the farmer for the vast amount of milk which is produced for conversion into butter, cheese, and other dairy products (R. 355–359). The direct effect which fluctuations in the producer's price of market milk have upon the producer's price of milk processed into dairy products, which move in interstate commerce to every state in the country, becomes apparent when one considers the very high degree of correlation which exists between the prices of milk used for different purposes (R. 342). Thus the degree of correlation between the farm price of butterfat and the farm price of fluid milk sold at

wholesale is extremely high (Fig. I, following R. 342); and the same is true of the relationship between the price of butterfat and the wholesale price of butter (Fig. 3, following R. 343). It is also true that the relationship between the farm price of butterfat and the price paid producers for milk sold for manufacture of condensed and evaporated milk is very close, not only for the nation as a whole (Fig. 4, following R. 343) but for each geographical area in the country (Figs. 5–11, following R. 343). These remarkably close relationships between the prices received by producers for milk utilized in its various major uses exist because of the fact that dairy farmers can and do shift their milk among its various uses in response to fluctuations in the prices they receive, and this shifting tends, under normal conditions, to bring the prices of milk in its various uses into line with each other (R. 345, 356–357).

The prices received by producers for milk consumed in fluid form are similarly closely related to the producer's price of manufacturing milk (R. 345), so that fluctuations in the producer's price of milk produced for consumption in the Los Angeles Area and in every other major milk market in the country directly affect the nation-wide interstate commerce in dairy products and the prices received by farmers for the milk which goes into those dairy products (R. 355–359).

The correlation between the producer's price of milk produced for fluid consumption and the price

received by producers for milk employed in its other major uses is not restricted to a consideration of average prices of milk in the country as a whole (R. 346–347). The same high degree of correlation obtains between the price of dairy products and the price of fluid milk in each of the local milk markets in the country, considered as a unit. These price relationships obtain in Los Angeles (Fig. 16, following R. 347), and in Seattle, Washington (Fig. 18, following R. 347), as well as in other markets in every section of the country (R. 347; Figs. 12–21, following R. 347).

The conditions under which milk is produced and marketed make it inevitable that the farmer's price of manufacturing milk is directly and immediately affected by fluctuations in the farmer's price of milk produced for fluid consumption in the large cities of the country, of which Los Angeles is, of course, one.

Because of its perishability and the relatively high cost of transporting it, market milk can be produced economically only at short distances from the city in which it is consumed (R. 326). Los Angeles and practically every other sizable municipality in the country have local health regulations prescribing in detail the conditions under which milk to be sold for consumption in the cities must be produced. Compliance with such health requirements and the higher costs generally incident to proximity to urban centers make the cost of pro-

ducing market milk definitely higher than the cost of producing manufacturing milk (R. 349). Under normal marketing conditions, the producer of market milk will receive more for his milk than will the producer of manufacturing milk, by an amount sufficient to compensate the former for his higher cost of production (R. 349).

It is obvious that the sharp decrease in the purchasing power of the inhabitants of urban and industrial centers such as Los Angeles during the depression has greatly reduced the ability of the urban population to purchase market milk. The struggle of distributors to maintain sales in rapidly contracting markets has commonly resulted in price-cutting, price wars, and other destructive methods of competition. This competitive warfare among distributors has forced down the price received by dairy farmers for market milk, in many instances to price levels below that justified by the decrease in the demand for fluid milk and cream (R. 317). Thus the California dairy farmer has been receiving, since 1932, considerably less for his milk than he received during the period August, 1909–July, 1914, the "base period" defined by the Agricultural Adjustment Act, although the farmer's cost of living has been higher during the last few years than it was during the "base period" (R. 316, 320–321). Between 1929 and 1932 the gross income of California dairy farmers from milk declined 35.4%. Throughout the nation the decline for this same period was 46% (R. 317).

These practices which have prevailed in the local milk markets throughout the country have immediately and directly affected the national price for butter and other dairy products which move in interstate commerce, in the following manner: Faced with a condition which made the production of market milk for urban consumption unprofitable, farmers producing such market milk have tended to shift from the production of market milk to the production of manufacturing milk for processing into butter and other products, for which production costs (due to the absence of health requirements) and transportation charges are lower (R. 349). The increased supply of manufacturing milk so produced results in an increase in the amount of butter and other dairy products manufactured. This necessarily disturbs the normal movement of dairy products in interstate commerce throughout the nation and tends to reduce the national price of such dairy products. The increased supply of dairy products and the reduced price at which they can be sold necessarily reduce the price which farmers producing manufacturing milk receive for their product (R. 355–359).

In the case of market milk this price correlation is due not only to the fact that dairy farmers continually tend to dispose of their milk for the use most profitable at a given time; an additional factor is the necessity for producing market milk in excess of anticipated daily consumption. The de-

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mand for fluid milk in any given market varies markedly from day to day. In order to meet the unpredictable daily variations in demand, producers must supply distributors with a quantity of milk at least 15% in excess of the average daily consumption in the market. The surplus of fluid milk not consumed can be disposed of only by processing it into butter, cheese, or other dairy products (R. 345–346).

The Supreme Court of the United States has recognized the existence of the problem presented by this surplus milk. In *Nebbia* v. *New York,* 291 U. S. 502, which sustained the constitutionality of a New York statute empowering an administrative board to fix both minimum prices which distributors must pay producers for their milk and minimum prices below which distributors were forbidden to resell such milk, the court said:

> The fluid-milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20%, because milk, an essential food, must be available as demanded by consumers every day in the year, and the demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus sur-

plus milk presents a serious problem, as the prices which can be realized for it are much lower than those obtainable for milk sold for consumption in fluid form or as cream.

The dairy products so produced from surplus milk compete directly with the dairy products produced from manufacturing milk and distributed in interstate commerce. This condition exists in Los Angeles. Market milk produced for the Los Angeles market is greatly in excess of the consumptive demand for milk in fluid form in that city. During 1933 the surplus milk received at the Los Angeles market and diverted into manufacturing channels averaged 20,000 pounds daily (R. 349). A considerable proportion of the dairy products manufactured in California are shipped in interstate commerce to the East and Middle West for consumption (R. 349–350). Thus in 1932, 13% of the total United States production of evaporated milk was produced in California (R. 326).

In the light of these facts, it is clear that the farmer's price of milk employed in any one of its major uses is closely interrelated with the price which farmers receive for milk employed in any other use (R. 342). The nature of the dairy industry is such that marketing conditions for fluid milk in the urban centers of the country, of which Los Angeles is one, affect in a direct and immediate manner the interstate movement of dairy products and the price received by farmers for the vast amount of milk which is converted into those dairy

products (R. 355–359). The fundamental purpose of the Agricultural Adjustment Act is to increase the price received by farmers for their products which move in interstate commerce. With respect to the dairy industry it would be impossible to achieve this purpose without regulating the distribution of fluid milk in such markets as Los Angeles, even though the fluid milk distributed in such markets does not itself move in interstate commerce. The distribution of fluid milk for consumption in Los Angeles, if considered by itself, would seem to be an activity the economic incidence of which is confined to the State of California. But when the distribution of milk in Los Angeles is viewed in relation to the dairy industry throughout the country, it is apparent that it directly and immediately obstructs the great amount of interstate commerce in dairy products and directly affects the price received by the great number of farmers whose dairy products move in interstate commerce.

The Los Angeles Licenses are an integral part of a national program for the stabilization of the producer's price of milk by the issuance of Licenses in all of the milk sheds of the country, pursuant to section 8 (3) of the Act (R. 318). These Licenses are calculated to eliminate price fluctuations in unstabilized fluid-milk markets caused by price wars, unwarranted price-cutting, and other destructive competition and are necessary in order to remove the burdens upon and obstructions to the free flow

of butter and other manufactured dairy products in interstate commerce throughout the nation.

Under circumstances less clear than these, the Supreme Court has sustained federal regulation of purely intrastate activities upon the ground that such intrastate activities burdened interstate commerce by adversely affecting the price of commodities which move in interstate commerce. One of the conspicuous instances of the exercise of such authority by Congress, which was sustained by the Supreme Court, is found in *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. Congress had enacted the Grain Futures Act which regulated transactions in grain upon the Boards of Trade of the country. Certain of the transactions subjected to federal regulation by the Act, although intrastate in form, involved actual interstate movements of grain. These regulations were sustained upon the theory that the transactions regulated were indispensable incidents to the continued flow of grain from the West to the East and hence subject to Congressional regulation, upon the authority of *Stafford* v. *Wallace,* 258 U. S. 495, discussed hereafter.

But the principal regulation provided for in the Grain Futures Act, and the one chiefly attacked in the *Olsen* case, was the regulation of trading in grain for future delivery. Such purchases and sales for future delivery rarely result in the transfer or delivery of the actual commodity. Not only are such transactions intrastate in form, *but they*

involve no physical movement of the commodity whatsoever. Purchases for future delivery are, in the vast majority of cases, offset by sales before the delivery date arrives and vice versa, so that no physical movement of commodities is involved, even incidentally, in the transaction. The court recognized this fact, saying at page 36:

> The question under this Act is somewhat different in form and detail from that in the *Stafford* case, but the result must be the same. It is not the sales and deliveries of the actual grain which are the chief subject of the supervision of federal agency by Congress in the Grain Futures Act * * *. It *is the contracts of sales of grain for future delivery, most of which do not result in actual delivery* but are settled by offsetting them with other contracts of the same kind, or by what is called " ringing."

Nevertheless, the Court sustained the regulation of future sales under the Grain Futures Act. The Court found that such sales had in the past, and might in the future, *influence the price paid for cash grain which actually moves in interstate commerce.* Congress had found in the Act that the manipulation of the price of grain futures worked to the detriment of producers, consumers, shippers, and legitimate dealers engaged in interstate commerce in grain. The Court conceded that the curve of grain futures prices did not parallel the curve of cash grain prices. It pointed out that the price

of grain futures and the price of cash grain were not dependent upon the same factors. It concluded, however, that speculative transactions in grain futures *from time to time* exerted a vicious influence upon and produced abnormal fluctuations in the *price of cash grain which actually moves in interstate commerce.* Based upon this finding, and although the influence of futures prices upon cash grain was held to be not constant but only occasional, the Court held that grain futures transactions were subject to regulation. In reaching this conclusion, the Court said, at page 40:

> *The question of price dominates trade between the states. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it.* By reason and authority, therefore, in determining the validity of this Act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the Chicago Board of Trade *may,* and *from time to time does, directly burden and obstruct commerce between the states* in grain, and that it recurs and is a constantly possible danger. For this reason, Congress has the power to provide the appropriate means adopted in this Act by which this abuse may be restrained and avoided. (Italics ours.)

The futures transactions regulated by the Grain Futures Act were not connected with an actual movement of grain, but they did occasionally af-

fect the price of grain moving in interstate commerce, and this was held sufficient to justify the Act as a regulation of interstate commerce. Similarly, in the case at bar the purchase of milk from producers by appellees is not in itself part of a movement of milk in interstate commerce, but the terms of such purchases and the conditions under which they were made directly affected the price and the movement in interstate commerce of dairy products. For as we have shown, the price which Los Angeles distributors pay producers for their fluid milk is so related to the producer's price of manufacturing milk that fluctuations in the one are directly reflected in fluctuations in the other.

Thus, the purchases of fluid milk by distributors in the Los Angeles Area affect the movement of dairy products in interstate commerce and the price of those products just as directly as the trading in grain futures affected the price and movement of grain in interstate commerce. Therefore, the *Olsen* case squarely sustains the Los Angeles Milk Licenses as a constitutional regulation under the Commerce Clause.

In deciding the *Olsen* case, the Supreme Court followed and extended the doctrine announced in its earlier decision in *Stafford* v. *Wallace,* 258 U. S. 495, in which purchases and sales of cattle at the Chicago Stockyards, although in themselves intrastate in character, were held subject to regulation by Congress because they were incidents to the na-

tional flow of interstate commerce in cattle. Although the conduct involved in the *Stafford* case occurred within the boundaries of a single state, it was held at page 521:

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

The authority of Congress to regulate purely intrastate activities which burden and affect interstate commerce by exerting an adverse influence on the prices of commodities which move in interstate commerce is further and strikingly illustrated in the cases arising under the Anti-trust laws.

The purpose of the Sherman Anti-trust Act was to prevent the creation of combinations which, through control of the supply of goods, would be in a position to injure the consuming public through the exaction of unduly high prices. In many cases the Supreme Court has upheld the application of the Sherman Act to conduct purely intrastate in character which tended to increase the price or restrict the movement of goods in interstate commerce.

In *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344 (the first *Coronado* case), the Supreme Court was concerned with the effect of purely local activities of striking coal miners upon interstate commerce and, after citing many cases, said, at page 408:

> It is clear from these cases that if Congress deems certain recurring practices, *though not really part of interstate commerce,* likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint. (Italics ours.)

In *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295 (the second *Coronado* case), it appeared that the purpose of the striking miners had been to prevent the movement in interstate commerce of approximately 5,000 tons of coal daily, in order to prevent the nonunion coal from forcing down the price of coal mined by union miners. In reversing a directed verdict for the defendants, the Supreme Court stated, at page 310:

> The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate

> commerce, *or the price of it in interstate markets,* their action is a direct violation of the Anti-trust Act. (Italics ours.)

Thus, in the *Coronado* cases purely intrastate activities which obstructed the movement of a relatively slight amount of coal in interstate commerce and which might possibly have had some slight effect upon the price of coal produced in other mines and moving in interstate commerce, was held to have an effect upon interstate commerce sufficient to warrant regulation by the Federal Government. In the case at bar the conditions under which distributors in fluid-milk markets such as Los Angeles purchase milk from producers have a far greater and more immediate effect upon the movement of dairy products in interstate commerce and the price received by farmers for the milk from which those products are made.

Similar to the *Coronado* cases is *Local 167, International Brotherhood of Teamsters, etc.* v. *United States,* 291 U. S. 293, where the Government sought to enjoin persons handling poultry in New York City from violating the Sherman Anti-Trust Act by obstructing interstate commerce in poultry in order to increase prices. The conduct of some of the defendants related to the handling of poultry only after its interstate transportation into New York City had ended, and they therefore contended that their intrastate activity could not

properly be enjoined. In refuting this contention the Supreme Court said:

> Marketmen organized the Chamber of Commerce and allocated retailers among themselves and agreed to and did increase prices. * * *
>
> It may be assumed that sometime after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. *Public Utilities Comm'n* v. *Landon,* 249 U. S. 236, 245. *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298, 309. *East Ohio Gas Co.* v. *Tax Comm'n,* 283 U. S. 465, 470–471. But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the *prices at the place of origin before the interstate journey begins* or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. *United States* v. *Brims,* 272 U. S. 549. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310. *United States* v. *Swift & Co.* 122 Fed. 529, 532–533. Cf. *Swift & Co.* v. *United States,* 196 U. S. 375, 398. The Sherman Act denounces every conspiracy in restraint of trade *including those that are to be carried on by acts constituting intrastate transactions.* * * *
>
> Maintaining that interstate commerce ended with the sales by receivers to marketmen, appellants insist that the injunction

> should only prevent acts that restrain commerce up to that point. *But intrastate acts will be enjoined whenever necessary or appropriate for the protection of interstate commerce* against any restraint denounced by the Act. (Italics ours.)

The proposition that the purchase of milk from producers by appellees may be constitutionally regulated as an exercise of the Federal Commerce power, despite the fact that the milk handled by appellees is never in interstate commerce, is further sustained by other Anti-trust decisions in which it clearly appeared that the defendants were not themselves engaged in commerce of any sort.

Thus in *Standard Oil Co.* v. *United States,* 283 U. S. 163, a suit to enjoin violation of the Sherman Anti-trust Act, the combination enjoined related to the manufacture of gasoline by the process of cracking. The Supreme Court held the Act applicable to the defendants, although their conduct in question related only to the manufacture of gasoline. The Court said at page 169:

> Moreover, *while manufacture is not interstate commerce,* agreements concerning it which tend to limit the supply or to *fix the price of goods entering into interstate commerce,* or which have been executed for that purpose, are within the prohibitions of the Act.

Other cases sustaining the application of the Anti-trust Acts to defendants who were engaged in

purely intrastate activity which, however, burdened interstate commerce by affecting the price of commodities which moved in interstate commerce, are: *United States* v. *Patten,* 226 U. S. 525 (defendant traded in cotton futures in an effort to raise the price of cotton by cornering the supply); *Swift and Co.* v. *United States,* 196 U. S. 375 (defendants agreed not to compete in the purchasing of cattle at the Chicago Stockyards in order to reduce the prices received by cattle growers); *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211 (defendants were manufacturers of sewer pipe who agreed not to compete for contracts for pipe, in order to increase the price which purchasers would be obliged to pay); *Loewe* v. *Lawlor,* 208 U. S. 274; *Bedford Co.* v. *Stone Cutters Association,* 274 U. S. 37.

Perhaps the clearest statement of the true scope of the power of Congress to regulate intrastate conduct which affects and burdens interstate commerce is that contained in *United States* v. *Ferger,* 250 U. S. 199, involving the validity of an act of Congress making it a crime to utter counterfeit bills of lading purporting to represent shipments of goods in interstate commerce. The Court said at page 203:

> Thus both in the pleadings and in the contention as summarized by the court below it is insisted that as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Con-

> gress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, *instead of by the relation of that subject to commerce and its effect upon it.* We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (In re Debs, 158 U. S. 564) and with a host of other acts which, *because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves.* (Italics ours.)

In the court below, appellees, in contending that these two licenses were not a regulation of interstate commerce but an attempt by the Federal Government to regulate matters solely within the jurisdiction of the State, relied upon *Coe* v. *Errol,* 116 U. S. 517, and *Kidd* v. *Pearson,* 128 U. S. 1. The District Court sustained appellees' contention on the authority of *Minnesota* v. *Blasius,* 290 U. S. 1; *Chassanoil* v. *Greenwood,* 291 U. S. 584; *Nashville C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249; and *Federal Compress Co.* v. *McLean,* 291 U. S. 17.[4]

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[4] The District Court decided this case on the basis of its decision in *Hill* v. *Darger* (R. 253). That case is also before this Court on appeal: *Darger* v. *Hill,* No. 7656.

Appellants respectfully submit that these cases not only fail to support the proposition for which they were cited, but are not in any respect inconsistent with appellants' contention here. It is important to note that *every one of these cases involved the constitutionality of a State, not a Federal, statute.* The question before the Supreme Court in each of these cases was whether or not the State statute in question unduly interfered with interstate commerce, and it does not at all follow from the decisions in these cases sustaining a State tax upon or regulation of a particular business that Congress might not also regulate that business under the Commerce power. For the Supreme Court has many times affirmed that the right of a State to regulate or tax a commodity under such circumstances, is *not* exclusive of the right of the Federal Government to regulate, under the Commerce Clause, transactions respecting that same commodity. In such a case the State and Federal Governments have concurrent, not mutually exclusive, jurisdiction, provided that the state regulation is not in conflict with federal regulation.

The very case relied upon by the Court below, *Minnesota* v. *Blasius,* 290 U. S. 1, clearly demonstrates this proposition. That case involved the right of the State of Minnesota to tax, as personal property, cattle situated in the St. Paul stockyards on a given date. The cattle had been shipped to the yards from a point outside of Minnesota and were purchased by the defendant from a commission merchant. On the day after the taxable date the

cattle were shipped outside of Minnesota. The court found that the vast majority of cattle so handled in the St. Paul stockyards were shipped in from states other than Minnesota and passed through the stockyards to other states. In deference to *Stafford* v. *Wallace,* 258 U. S. 495, and *Tagg Bros. and Moorhead* v. *United States,* 280 U. S. 420, the Minnesota Supreme Court held the tax invalid on the ground that the cattle were in the current of interstate commerce and hence could not be taxed by the State. The United States Supreme Court reversed the Supreme Court of Minnesota and sustained the constitutionality of the tax, pointing out that although the cattle in the stockyards were in the current of interstate commerce and hence subject to regulation by the Federal Government, it did not follow therefrom that the cattle could not be taxed by the State of Minnesota:

> But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a State may not lay a non-discriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State. The distinction was recognized in *Stafford* v. *Wallace, supra,* pp. 525, 526, where the Court cited, as an illustration, the case of *Bacon* v. *Illinois,* 227 U. S. 504, in which such a non-discriminatory property tax was sus-

> tained. And the Court in the *Stafford* case quoted from the opinion in the *Bacon* case (*supra,* p. 516), the following statement of the distinction: "*The question*" (*that is, as to the validity of the state tax*) "*it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce,* but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority."
>
> * * * Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation. (Italics ours.)

And in many other cases the Supreme Court has expressly declared that the right of a State to tax or regulate transactions with respect to a commodity is *not* exclusive of the right of the Federal Government to regulate, under the Commerce Clause, transactions respecting that same commodity. See *Stafford* v. *Wallace,* 258 U. S. 495, at page 525; *Bacon* v. *Illinois,* 227 U. S. 504, at page 516; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, at pages 245, 246.

It is, therefore, clear that the decisions relied upon by appellees and the District Court in sustaining the power of a state to tax or regulate intrastate business or transactions, were not intended to establish that under appropriate circumstances

those same intrastate transactions could not be regulated by Congress under the Commerce Clause. Illustrations are not wanting of intrastate activities which the Supreme Court has held to be subject to regulation by *both* State and Federal Governments. Thus intrastate railroad rates may be regulated by the states (*Minnesota Rate Cases,* 230 U. S. 352); but when intrastate rates affect interstate commerce, Congress may regulate them (*The Shreveport Case,* 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago B. & Q. Ry.,* 257 U. S. 563). Sales of grain on grain exchanges are intrastate sales. The states may both regulate such sales (*Dickson* v. *Uhlmann Grain Co.* 288 U. S. 188, 198) and tax the grain which is the subject of sale (*Bacon* v. *Illinois,* 227 U. S. 504); and yet detailed regulation by Congress of all transactions on the grain exchange has been upheld (*Board of Trade* v. *Olsen,* 262 U. S. 1). Similarly a state may tax cattle in the stockyards (*Minnesota* v. *Blasius,* 290 U. S. 1); yet Congress may, at the same time, regulate the stockyards and the sales of cattle therein (*Stafford* v. *Wallace,* 258 U. S. 495; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420). And states may tax mining, which is not interstate commerce (*Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245); while Federal legislation may also apply to mining where interstate commerce is burdened (*Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295).

It is obvious, therefore, that none of the cases cited by appellees and relied upon by the District Court has any bearing on the question as to whether the Federal Government may regulate the purchase of milk by Los Angeles distributors from producers, although the fluid milk distributed in Los Angeles does not itself move in interstate commerce.

We submit that we have demonstrated that the prices at which distributors purchase milk from producers for fluid consumption in the urban markets of the country, of which Los Angeles is one, are so immediately related to the national movement of dairy products in interstate commerce and the price received by farmers for the milk converted into those products, that it would be impossible to increase the price for milk received by dairy farmers throughout the country without regulating the purchase of fluid milk by distributors in the urban markets. The cases discussed above clearly demonstrate that the Federal commerce power extends to the regulation of purely intrastate activities which directly affect the price and the movement of commodities in interstate commerce. Therefore, the Agricultural Adjustment Act and the Los Angeles Milk Licenses, in fixing the minimum prices which distributors such as appellees are obliged to pay producers for their milk, are a valid exercise of the power granted the Federal Government by the Commerce Clause of the Constitution.

B. Fixing the purchase price of milk which moves in interstate commerce is a proper regulation of interstate commerce

As we have demonstrated above, fixing the producer's price for fluid milk which is distributed in such intrastate markets as Los Angeles, is absolutely essential to the effective stabilization of the price received by the farmer for the vast amount of milk which is converted into butter, cheese, and other dairy products moving in interstate commerce. Appellees have not contended that the power of Congress to regulate interstate commerce may not be exercised by fixing the price to be paid producers for a commodity which moves in the current of interstate commerce, but we propose to show that the fixing of producer's prices for commodities which move in interstate commerce is a valid mode of regulating interstate commerce.

That such price fixing is not forbidden by the due process clause of the Fifth Amendment will be demonstrated below.

The Supreme Court has clearly affirmed that the Federal Government may, in the exercise of its commerce power, fix the purchase price of a commodity.

Lemke v. *Farmers Grain Co.,* 258 U. S. 50, involved the constitutionality of a North Dakota statute which regulated the business of purchasing grain from farmers within that state. Among other things, the statute *fixed the price to be paid for grain purchased from growers by buyers in the*

State. It appeared that a very large percentage of all the grain grown in North Dakota was shipped in interstate commerce outside of the state after its purchase. The Supreme Court held the statute invalid on the ground that the fixing of the prices to be paid producers of such grain was a regulation of interstate commerce and hence could be imposed only by the Federal Government and not by the State. In discussing the terms of the statute, the Court stated, at page 58:

> That is, the state officer may *fix and determine the price to be paid for grain* which is bought, shipped, and sold in interstate commerce. That this is a regulation of interstate commerce is obvious from its mere statement.
>
> Nor will it do to say that the State law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. * * *
>
> It is alleged that such legislation *is in the interest of the grain growers* and essential to protect them from fraudulent purchasers and *to secure payment to them of fair prices* for the grain actually sold. This may be true, but *Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed.* The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach

> upon the field of interstate commerce placed by the Constitution under Federal control. (Italics ours.)

Thus, in holding invalid the North Dakota statute which sought to fix the price farmers were to be paid for their grain, the Court expressly said that such power to fix prices to growers of commodities moving in the current of interstate commerce was specifically delegated to the Federal Government under the Commerce Clause of the Constitution. Indeed, the Supreme Court regarded the fixing of the purchase price of a commodity which moves in interstate commerce so direct, immediate, and vital a regulation of interstate commerce that it held that the States lacked the power to fix such price, even in the absence of prior federal legislation pre-empting the field.

And in *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, the Supreme Court, in declaring unconstitutional a statute similar to that involved in the *Lemke* case, expressly stated that the purchase of a commodity prior to its movement in interstate commerce *is itself a part of interstate commerce* (p. 198):

> Buying for shipment, and shipping, to markets in other states when conducted as before shown *constitutes interstate commerce—the buying being as much a part of it as the shipping.* (Italics ours.)

To the same effect is *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282.

The power of the Federal Government to fix the price of an agricultural commodity which moves in interstate commerce was thus directly affirmed in the *Lemke* and *Shafer* cases. It is precisely this power which Congress has exercised in the Agricultural Adjustment Act, and which the Secretary of Agriculture has executed by issuing Milk Licenses in the urban markets of the country, Los Angeles among others.

That fixing the price of a commodity which moves in interstate commerce is an appropriate mode of regulating interstate commerce has been reaffirmed by the Supreme Court this year. On October 16, 1934, the Supreme Court affirmed without opinion the decision of a three-judge federal court in the case of *Seelig* v. *Baldwin, et al.*, 7 Fed. Supp. 776 (D. C. S. D. N. Y.). That case involved the constitutionality of a provision of the New York Milk Control Act making it unlawful to sell in New York milk produced outside the State and purchased from the producer at a price less than the minimum producer price fixed by the statute for purchases of milk within the State. The plaintiff purchased the milk in Vermont at less than the minimum New York producer price and shipped it to New York. The Court held that, insofar as the statute forbade the plaintiff from reselling such milk in the cans in which he had transported it, it was unconstitutional because such sale was a part of interstate commerce.

The denial of any right in the states to fix the price of a commodity which moves in interstate commerce is necessarily an affirmance that such right exists in the Federal Government, for otherwise, as the Supreme Court said in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, at page 231:

> If neither Congress nor the State legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state or national, which can legislate upon the subject of or prohibit such contracts. This cannot be the case.[5]

And see the *Head Money* cases, 112 U. S. 580, at 593.

The Supreme Court has recognized in other cases that the *price* of a commodity which moves in interstate commerce is so directly related to the interstate movement of the commodity itself that price regulations may appropriately be made in the exercise of the power of the Federal Government to regulate interstate commerce.

A primary purpose of the statutes involved in both *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1,

[5] It certainly cannot be contended that neither the states nor the Federal Government can regulate the price of milk, for the Supreme Court has expressly held that the states do have this power with respect to intrastate milk (*Nebbia* v. *New York*, 291 U. S. 502, discussed below at page 77); and that the Federal Government has this power when interstate commerce is involved (*Seelig* v. *Baldwin et al.*, United States Supreme Court, decided October 16, 1934, discussed above at page 68).

and *Stafford* v. *Wallace,* 258 U. S. 495, was to insure that the producers of agricultural commodities (grain and livestock) would receive fair prices for their products. The Supreme Court recognized that the direct causal relationship which obtains between the producers' price of the commodity and its movement in interstate commerce renders the regulation of such price an appropriate exercise of the power of the Federal Government to regulate interstate commerce. In *Chicago Board of Trade* v. *Olsen,* the court said, at page 39:

> If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which *unduly depress prices of grain* in interstate commerce and directly influence consignment in that commerce are equally direct. *The question of price dominates trade between the States. Sales of an article which affect the countrywide price of the article directly affect the countrywide commerce in it.* (Italics ours.)

And see *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, and *Local 167 etc.* v. *United States,* 291 U. S. 293, both of which cases sustained federal regulation of intrastate conduct which directly affected the price of commodities in the current of interstate commerce.

We submit, therefore, that the foregoing decisions of the Supreme Court clearly establish that

the stabilizing of prices received by dairy farmers for the great volume of milk which moves in interstate commerce in the form of dairy products is clearly within the commerce power of the Federal Government. As we have shown in the preceding section of this point in the brief, the fixing of minimum prices which distributors must pay producers for milk distributed in the urban markets, such as Los Angeles, is absolutely essential to the attainment of this appropriate exercise of the Federal commerce power. The constitutionality of the Agricultural Adjustment Act and the Los Angeles Milk Licenses, under the Commerce Clause, is therefore clear.

C. The purpose of the Agricultural Adjustment Act and the Los Angeles Milk Licenses in fixing the price to be paid farmers for milk, is to increase the national flow of interstate commerce

In the preceding section we have shown that it is within the power of Congress to fix the price of an agricultural commodity which moves in interstate commerce. Under the cases which we there cited, the purpose of Congress in making such regulation is immaterial as far as the question of its power so to do under the Commerce Clause is concerned. It would, therefore, be unnecessary in sustaining the exercise of the power, to consider the ultimate objective which Congress had in mind in the passage of the Agricultural Adjustment Act. We wish, however, to point out to the Court that not only is the particular regulation (the fixing of prices to

producers) contemplated by the Agricultural Adjustment Act and applied in the Los Angeles Milk Licenses an appropriate regulation of interstate commerce, but that the ultimate objective of Congress in adopting this legislation was to remove obstructions to and so increase the national flow of interstate commerce.

There is no need for conjecture as to the condition which Congress decided to remedy by the passage of the Agricultural Adjustment Act or the mechanism which it adopted to remedy that condition. The statute itself answers both questions. It expressly declares that an acute emergency exists throughout the Nation; that a severe and increasing disparity exists between the return the farmers receive for their products and the prices which they must pay for industrial products; that this disparity has broken down and made impossible the orderly exchange of commodities and has burdened and obstructed the normal currents of commerce in such commodities.

In effect, the statute recites that the national flow of interstate commerce has fallen to an alarmingly low level and declares that it is the purpose of Congress, through the Agricultural Adjustment Act, to secure to the farmer an increased price for his commodities. But such increased price is secured for the farmer, under the licensing provisions of the Act, only for those commodities which enter into the current of interstate commerce. Further, Congress, by enacting this legislation, intended to se-

cure for the farmer an increased purchasing power to the end that he in turn, by increasing his purchases, might help increase and restore the national interstate commerce to its normal volume. The purpose of Congress in enacting this legislation was therefore (*a*) to secure to the farmer a greater return on commodities produced by him which move in the current of interstate commerce, and (*b*) to increase the flow of national interstate commerce for the benefit of the entire nation.

Thus, one of the means adopted by Congress to alleviate the general economic crisis, one of the cornerstones of the entire recovery program, was the passage of the Agricultural Adjustment Act, which provided a means for increasing the purchasing power of the farmer and thereby increasing the flow of interstate commerce. This purpose clearly appears from the face of the statute itself. Whether Congress was right or wrong in the economics of its reasoning is beside the point here. Thus in *Stafford* v. *Wallace,* 258 U. S. 495, the Supreme Court said (page 521):

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. *This Court will certainly not substitute its judgment for that of Congress in such a*

> *matter, unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.* (Italics ours.)

Not only has the fixing of prices under the Los Angeles Milk Licenses directly benefited the farmer by increasing the price of his product and so increased his purchasing power and the national flow of interstate commerce, but it has corrected marketing conditions prevailing in the dairy industry which have led to unfair competitive practices on the part of distributors, resulting in a price for milk lower than that justified by the supply and demand situation existing even during this period of depression (R. 317). The power of Congress by legislation to correct competitive practices, which in its opinion are detrimental to the interstate commerce of the nation, has long been recognized by the courts in dealing with the Anti-trust Laws. At the time of the adoption of the Anti-trust Laws it was the opinion of Congress that free and unrestricted competition was a wise and wholesome situation for all commerce, and that the national prosperity required that such free competition be maintained. The courts did not then inquire into the soundness of the economic theory thus adopted by Congress but upheld the Anti-trust Laws as a proper exercise of the commerce power. Thus, in *Northern Securities Co.* v. *United States,* 193 U. S. 197, the Court said (p. 337):

> *Whether the free operation of the normal laws of competition is a wise and wholesome*

> *rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied.* But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws and not of men. (Italics ours.)

As appears from the face of the Agricultural Adjustment Act, Congress has now found that the forces of free competition with respect to agricultural commodities, are, if unrestricted, not in the interest of the national prosperity. It has, therefore, in order to promote the national prosperity and the free flow of interstate commerce, enacted the Agricultural Adjustment Act for the purpose, among others, of curbing such competitive practices. The Los Angeles Milk License, by fixing

prices to producers, eliminates unfair competitive practices among distributors, which resulted, under a regime of unrestrained competition, in beating down the price of milk to the producer. The relation of the remedy so employed to interstate commerce being clear, we submit that it should be sustained as a proper exercise of the commerce power.

VIII

The Los Angeles Milk Licenses are a reasonable and appropriate regulation of the dairy industry and are valid under the due process clause of the Fifth Amendment

Appellees allege that the application of the Los Angeles Milk Licenses to them is not only an unconstitutional attempt to regulate interstate commerce but that the provisions of the Licenses violate the due process clause of the Fifth Amendment to the Constitution. Though the Court below did not purport to pass upon these contentions, we shall demonstrate that these Licenses are reasonable regulations of the Dairy Industry and hence are not objectionable as depriving appellees of property without due process of law. In the discussion of this point it will be assumed that, as has been demonstrated above, these Licenses are a proper exercise of the Federal power to regulate interstate commerce.

Any possible contention that the regulation of the dairy industry by the Los Angeles and similar Milk Licenses violates the due process clause of the Fifth Amendment is conclusively refuted by

Nebbia v. *New York*, 291 U. S. 502, and *Hegeman Farms Corporation* v. *Baldwin et al.*, 55 Sup. Ct. Rep. 7, decided on November 5, 1934.

Nebbia v. *New York*, 291 U. S. 502, sustained the constitutionality of the New York statute which delegated to an administrative commission the right to fix both minimum prices which distributors were obliged to pay producers for milk, and minimum prices at which distributors might resell milk. The Court specifically refuted the contention that the due-process clause of the Fourteenth Amendment [6] forbade the regulation of the dairy industry in the respects here involved, and decided that price-fixing is an appropriate and constitutional mode of regulating the dairy industry. The Court said at page 525:

> The Fifth Amendment, in the field of Federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They

[6] Clearly Congress is not more restricted by the Fifth Amendment than the state legislatures by the Fourteenth. The Supreme Court expressly so held in *Heiner* v. *Donnan*, 285 U. S. 312, at page 326. And the Supreme Court of the United States frequently cites cases arising under the due-process clause of the Fourteenth Amendment, in its decisions upon the due-process limitation upon Federal legislation and vice versa. For this reason some of the cases cited under this point involve the validity of state legislation, but the principles there discussed are equally applicable to legislation by the Federal Government.

merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. *And the guarantee of due process, as has often been held, demands only that the laws shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.* * * * The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community. * * *

If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, *appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at the one end of the series and the consumer at the other.* (Italics ours.)

Although the decision of the Supreme Court in the *Nebbia* case sustained the constitutionality of the regulation of both producer prices and resale prices, the issue strictly before the Court was the right to regulate resale prices. But the right to regulate producer prices was squarely involved in *Hegeman Farms Corporation* v. *Baldwin et al.,* decided by the United States Supreme Court on November 5, 1934. That case involved the constitutionality of orders of the New York Milk Control Board fixing both the minimum price below which New York milk distributors were forbidden to sell milk at retail and *the minimum prices which such distributors were obliged to pay producers for their milk.* The bill in that case alleged that the competition among milk dealers was so keen that in practice the legal minimum was the maximum price at which the plaintiff could sell its milk, and that the spread between the price at which the plaintiff could sell milk and the price which it was obliged to pay producers for such milk was so small that it was insufficient to enable the plaintiff to earn a fair return on its invested capital. Nevertheless, the Supreme Court held that such price fixing by the Milk Control Board did not violate the due process clause of the Fourteenth Amendment. In affirming the dismissal of the bill, the court said:

> If the designation of a minimum price is within the scope of the police power, expenses or losses made necessary thereby must be borne as an incident, unless the or-

> der goes so far beyond the need of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged.

The Supreme Court conceded that the effect of such price-fixing might drive out of business the weaker and less efficient milk distributors, but said:

> Whether a wise statecraft will favor or condemn this exaltation of the strong is a matter of legislative policy with which courts are not concerned. To pass judgment on it, there is need that the field of vision be expanded to take in all the contestants in the race for economic welfare, and not some of them only. The small dealer may suffer, but the small producer may be helped, and an industry vital to the state thus rescued from extinction. Such, at any rate, is the theory that animates the statute, if we look to the official declaration of the purpose of its framers. *Nebbia* v. *New York, supra,* pp. 515, 516. The question is not for us whether the workings of the law have verified the theory or disproved it. At least, a law so animated is rescued from the reproach of favoritism for the powerful to the prejudice of the lowly. If the orders made thereunder are not arbitrary fiats, the courts will stand aloof.

These two decisions of the Supreme Court establish beyond question that the dairy industry is subject to governmental regulation, and that the fixing of both minimum producer prices and minimum resale prices is an appropriate mode of regu-

lating the industry. Appellees' contentions that the Los Angeles Milk License, in fixing the minimum prices which they are obliged to pay producers for their milk, and minimum prices below which they may not resell milk, violates the due process clause of the Fifth Amendment, obviously must fall, in the light of *Nebbia* v. *New York,* 291 U. S. 502, and *Hegeman Farms Corporations* v. *Baldwin.*

The dairy industry is the most important branch of agriculture in terms of money value. Twenty-five percent of the total farm income in the United States is derived from dairy products (R. 319). The production and distribution of milk, both nationally and in the state of California is a paramount industry from which a major part of the rural population obtains its livelihood and which materially affects the health and prosperity of all the people. That the vital importance of milk and dairy products to the well-being of the nation renders the dairy industry an appropriate field for governmental regulation is demonstrated by the existence of many statutes and ordinances affecting the production and distribution of milk. Municipal health requirements for milk consumed in urban centers are practically universal. Legislation similar in its purpose to that of the Agricultural Adjustment Act and the Los Angeles Milk Licenses, to assure farmers a fair return for the milk which

they produce, has recently been enacted by eleven states, including California.[7]

The disastrous effects of the depression upon the dairy industry in general and in California in particular are set forth in the Gaumnitz affidavit (R. 315–317), from which it clearly appears that unless regulatory measures are adopted to insure dairy farmers a fair and reasonable price for their products, a large proportion of the farm population of the country will be deprived of its livelihood, its purchasing power will be seriously impaired and the health and safety of the people who depend in a large majority upon a consistent, pure and adequate supply of fresh milk will be endangered. Such a condition clearly calls for and justifies regulation of the dairy industry in the respects here involved.

Appellees allege as a further ground for invalidity under the due process clause that the Licenses impose charges upon them for the benefit of other persons, corporations, or enterprises. No doubt this contention is founded upon a misconstruction of those provisions of the Licenses which require payments to be made to the Los Angeles Milk In-

[7] New York: Laws 1934, ch. 126; Connecticut: Laws Cum. Supp. 1933, ch. 1078; New Jersey: Laws 1933, ch. 169; Pennsylvania: Pamphlet Laws 1933–34, p. 174; Ohio: Baldwin's Ohio Code Service 1933, § 10801; California: Compiled Statutes, 1933, ch. 754; Massachusetts: Acts and Resolves 1934, ch. 376; Oregon: Laws 1933, 2nd Extra Session, ch. 72; Rhode Island: Laws 1934, Senate Bill No. 83, Approved May 7, 1934; Vermont: Acts and Resolves, Spec. Sess. 1933, ch. 8; Florida: Laws 1933, ch. 16078.

dustry Board (p. 48 of pamphlet following R. 32), payments to be made to Milk Producers, Inc. (successor to Producers Arbitration Committee, Inc.) (pp. 49–50 of pamphlet following R. 32), and payments to be made to the Market Administrator (R. 138–140).

When properly understood, these provisions of the Licenses are seen as merely a necessary part of the plan to pay producers the minimum price. Moneys paid to the Los Angeles Milk Industry Board pursuant to Section 4 (b), (c), and (d) of Article III of License No. 17 (p. 48 of pamphlet following R. 32) and to the Market Administrator pursuant to Section D of Exhibit A of License No. 57 (R. 138–140) were and are to be used to meet the expenses of administering these Licenses and of rendering certain services to producers. It cannot be seriously contended that these provisions are invalid in view of the *Head Money Cases,* 112 U. S. 580; *Pure Oil Co.* v. *State of Minnesota,* 248 U. S. 158; *Patapsco Guano Co.* v. *North Carolina Board of Agriculture,* 171 U. S. 345; *Mountain Timber Co.* v. *State of Washington,* 243 U. S. 219; and *Noble State Bank* v. *Haskell,* 219 U. S. 104.

A detailed explanation of the necessity of Section 5 of Article III and Exhibit C of License No. 17 (pp. 49, 75 of pamphlet following R. 32) which provide for payments to Milk Producers, Inc. (successor to Producers Arbitration Committee, Inc.), is found in the Record (R. 363–364). This same explanation is applicable to Paragraph 7 of Section

A of Exhibit A of License No. 57 (R. 134) which provides for payments to the Market Administrator. It is there clearly demonstrated that these provisions are necessary because the daily supply of milk for the Los Angeles market far exceeds the consumptive demand for fluid milk and this surplus must be disposed of by manufacturing it into the cheaper forms of dairy products (R. 371, 380).

The payments required from certain distributors and paid out in turn to others are simply the means of distributing the total purchase price of fluid milk and surplus milk equitably among all producers. They impose no obligation upon distributors in addition to the primary obligation to pay fixed prices for all milk purchased.

The Supreme Court of the United States has expressly recognized the reasonableness of this type of regulation. The Court stated in *Nebbia* v. *New York, supra*, at page 517:

> The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 percent, because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk pre-

> sents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. *A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk shed.* So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a seriously disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i. e., an average between the price paid the producer for milk for sale as fluid milk and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price cutting often compels the larger dealer to cut the price, to his own and the producer's detriment. (Italics ours.)

We respectfully submit that the foregoing analysis and the decisions of the Supreme Court in the *Nebbia* and *Hegeman Farms* cases conclusively demonstrate that the provisions of the Los Angeles Licenses are reasonable regulations of the dairy industry and hence the application of these provisions of these Licenses to appellees does not deprive them of any property without due process of law.

IX

The power given the Secretary of Agriculture by the Agricultural Adjustment Act is a constitutional and valid delegation of legislative power

Although the District Judge did not discuss in his opinion the question as to whether the power delegated to the Secretary of Agriculture by the Act exceeds constitutional limits, this issue was raised by appellees below, and they may argue it here. We shall, therefore, briefly demonstrate that the delegation of power to the Secretary of Agriculture made by the Agricultural Adjustment Act is clearly constitutional.

It is appropriate to note that despite the great number of cases in which the Supreme Court has been urged to declare unconstitutional a statutory delegation of legislative power to an administrative official, *not a single Act of Congress has ever been declared unconstitutional by the Supreme Court on this ground.* The Supreme Court has always recognized the practical necessity of delegating to administrative officials the details of administering complicated legislation. Constitutional requirements are met when Congress lays down a general rule or policy and delegates to administrative officials the details of administering the law.

Thus in *Hampton, Jr. & Co.* v. *United States,* 276 U. S. 394, the Supreme Court sustained the constitutionality of the flexible tariff provision of the Tariff Act of 1922. This provision authorized the

President, upon investigation of differences in foreign and domestic costs of production, to change the classification and rates of duty initially established in the Tariff Act, and required the President to take into account differences in the selling price of domestic and foreign articles, as well as other advantages or disadvantages in competition. The opinion relied upon the precedents upholding rate-fixing in interstate commerce (page 407):

> Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory.

In *United States* v. *Grimaud,* 220 U. S. 506, the Supreme Court upheld a statute declaring that the Secretary of Agriculture "may make such rules and regulations and shall establish such service as will insure the objects of such reservation, namely,

to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violations of the provisions of this Act or such rules and regulations shall be punished * * *." The Secretary issued regulations providing that persons must secure permits before driving and grazing any sheep stock in a forest preserve, and made charges in connection therewith. The charges were for the purpose of preventing excessive grazing and thereby protecting the young growth and native grasses and to cover management expenses. In approving the regulations, the Court said (p. 516):

> In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. * * *

Other cases sustaining as constitutional Acts of Congress delegating to officials administrative details requiring the exercise of judgment are:

> *Avent* v. *United States,* 266 U. S. 127.
> *Buttfield* v. *Stranahan,* 192 U. S. 470.
> *Field* v. *Clark,* 143 U. S. 649.

Section 2 of the Agricultural Adjustment Act, together with the Declaration of Emergency in the

Act, lays down an immediate objective or general standard in economic terms; namely, the removal of burdens and obstructions to the normal currents of commerce in agricultural commodities in order to secure parity prices for farm products. The "parity price" as defined in the Act, is not a vague or uncertain concept; it is one which is definite and specific and can be computed by a mathematical formula. That this is so is clearly demonstrated by the Gaumnitz affidavit in which the computation of the parity price for milk in the Los Angeles Sales Area is fully set forth (R. 320, 321). Thus, when Congress delegated to the Secretary of Agriculture the power, through the issuance of Licenses, pursuant to section 8 (3) of the Act, to raise the purchasing power of the American farmer to the parity level, the Congressional mandate was definite and specific. It laid down a definite primary standard and delegated to the Secretary the administrative power to attain such a standard.

The number of industries covered by the Agricultural Adjustment Act is innumerable. The administrative difficulties which would be inherent in any plan having Congress regulate the terms and conditions to be included in the License for each industry make it perfectly obvious that any such procedure is impossible. The standard provided for in the statute is clear and explicit. The task which remains for the Secretary of Agriculture is an administrative one, namely, to provide the machinery in

each industry whereby the policy of the Act may be effectuated by increasing the returns to producers for their agricultural commodities, in order, as soon as possible, to achieve the parity price for such commodities.

The delegation to the Secretary of Agriculture by section 8 (3) of the Agricultural Adjustment Act, of the power to issue Licenses, has been specifically sustained as constitutional in *United States* v. *Calistan Packers, Inc.*, 4 Fed. Supp. 660 (D. C. N. D. Cal. 1934).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court granting the temporary injunction should be reversed and the cause remanded with directions to dismiss the bill of complaint.

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No. 7657

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY W. BERDIE, et al,
Defendants and Appellants,

vs.

CHARLES J. KURTZ, et al,
Plaintiffs and Appellees.

BRIEF FOR APPELLEES

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SUBJECT INDEX

AUTHORITIES—*Continued*

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CHARLES J. KURTZ, et al,
Plaintiffs and Appellees.

BRIEF FOR APPELLEES

Statement of the Case

By this action, plaintiffs and appellees seek to restrain and enjoin defendants and appellants from interfering with the conduct of the business of selling and distributing milk and cream as carried on by the several plaintiffs in the Los Angeles sales area. The Los Angeles sales area is entirely within the State of California. It includes only Los Angeles and Orange Counties and the adjacent westerly portions of Riverside and San Bernardino Counties. Each of the plaintiffs is engaged in the production and/or distribution of milk in said area, and each of the plaintiffs buy from numerous other producers in addition to their own production. All of said milk so purchased by plaintiffs is likewise produced in said area. All milk produced or purchased by plaintiffs

is sold and distributed entirely within the State of California.

Defendant and appellant, H. W. Berdie, is Regional Representative of the Licensing and Enforcement Section of the Agricultural Adjustment Administration of the United States Department of Agriculture, and assumed and claimed the right and power of enforcement of the provisions of License No. 17 and of the Marketing Agreement hereinafter more particularly mentioned. (R. 7.)

Los Angeles Milk Industry Board and its component members, to-wit, Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins and Ross Weaver, defendants and appellants herein, are members or claim to be members of said Los Angeles Milk Industry Board, and claim to have been selected in accordance with the provisions of License No. 17, and claim to have the right to exercise and do exercise the rights and duties and to do the things required of them under the provisions of said License No. 17, as hereinafter more particularly mentioned. (R. 5-6.)

Defendant and appellant, Milk Producers, Inc., is a corporation or association organized under the laws of the State of California as a cooperative non-profit corporation; its name was originally Producers Arbitration Committee, Inc., and has been regularly changed to Milk Producers, Inc. (R. 7.)

Defendant and appellant, Anders Larsen, claims to be the Enforcement Officer of the Agricultural Adjustment Administration of the United States Department of Agriculture Los Angeles sales area, appointed as such by the Secretary of Agriculture of the United States, and claims the right and power of enforcement of the provisions of Licenses Nos. 17 and 57 hereinafter more particularly mentioned, and of all orders of the Secretary of Agriculture. (R. 58-59.)

Defendant and appellant, H. C. Darger, is Market Administrator, appointed as such by the Secretary of Agriculture of the United States, under and pursuant to the provisions of License No. 57, and assumes and claims the right and power of enforcement of the provisions of said License No. 57, hereinafter more particularly mentioned. (R. 59.)

Defendant and appellant, Peirson M. Hall, is the United States District Attorney for the Southern District of California, and is the person designated by the Agricultural Adjustment Act, more particularly Section 8a, subdivision 7 thereof, to institute proceedings to enforce the remedies and to collect the forfeitures provided for, in or pursuant to said Agricultural Adjustment Act. (R. 59.)

Each and all of the defendants and appellants claim to have or assert the right and power to enforce the provisions of said Licenses Nos. 17 and 57, or one of them, among these provisions being the right and power to allot to each producer of milk in said area, a production base, and to refuse such bases from time to time as may be deemed necessary or advisable; to require of

each distributor of milk in the Los Angeles sales area, reports in such manner and containing such information as may be prescribed; to require each distributor to account for all of his sales, of the different classes or uses of milk, at the prices named in the said licenses; to fix the price to be paid by distributors to producers for milk delivered; to maintain adjustment accounts for each distributor, and to require such distributor to deduct and retain certain sums from each producer and to pay such sums under License No. 17, to Milk Producers, Inc., or to the Los Angeles Milk Industry Board; and under License No. 57, to defendant and appellant Darger as such Market Administrator; to collect debit balances thus shown, and to pay credit balances; to collect from distributors who purchase milk from producers who are not members of an association of producers, certain amounts based upon the pounds of butter fat purchased and distributed by said producer, and to require the distributor to deduct the same from payments due the producer; to examine the books and records of distributors, and under License No. 57, defendant and appellant Darger as such Market Administrator claims the right to require a bond from each distributor for the purpose of securing the fulfillment of such distributor's obligation. (R. 65-80, 95-103, 110.)

That none of the acts hereinbefore set forth are required to be reported to or approved by the Secretary of Agriculture or by any other person or officer. (R. 33-45, 117-150.)

For the period commencing November 20, 1933, and expiring May 31, 1934, the defendants and appellants

Harry W. Berdie, Milk Producers, Inc., Los Angeles Milk Industry Board and its component members, made numerous claims and demands upon the plaintiffs and appellees for the payments of various and sundry sums and amounts claimed to be due and owing by plaintiffs to Milk Producers, Inc. and Los Angeles Milk Industry Board; and commencing with the month of June, 1934, and subsequent thereto, defendant and appellant H. C. Darger, has claimed and demanded of plaintiffs and appellees various and sundry sums of money claimed to be due and payable from said plaintiffs under the provisions of License No. 57, none of which claims have been acquiesced in or consented to by plaintiffs herein, and none of which have been paid.

On the 16th day of November, 1933, the Secretary of Agriculture of the United States issued a document hereinafter mentioned, entitled License No. 17, License for Milk, Los Angeles Milk Shed, and purported to make it effective as of November 20, 1933, such License purportedly issued under and by virtue of the National Agricultural Adjustment Act, enacted on or about the 12th day of May, 1933, by the Congress of the United States, an act designated as an Act of May 12, 1933, Chapter 25, 48 Statutes, 73rd Congress, H. R. 3635, said Act being known as the "National Agricultural Adjustment Act."

On October 17, 1933, the Secretary of Agriculture of the United States signed a so-called Marketing Agreement for Milk in the Los Angeles Milk Shed, which was also signed by less than one-third of the persons, firms and corporations engaged in the business of producing

and/or distributing fluid milk in the Los Angeles sales area. None of these plaintiffs and appellees signed said agreement. Said agreement is referred to in said purported License No. 17. Said Marketing Agreement was revoked, cancelled and terminated by the Secretary of Agriculture on or about the 1st day of February, 1934.

On or about the 21st day of February, 1934, H. A. Wallace, Secretary of Agriculture, issued and caused to be served by registered mail upon each of the plaintiffs and appellees herein, an Order to Show Cause why the license of such plaintiff and appellee should not be suspended or revoked. Each such Order to Show Cause contained statements of alleged violations of the terms and conditions of License No. 17 charged against such plaintiff and appellee. On or about the 9th day of March, 1934, each of the plaintiffs and appellees made and filed their Answer to such Order to Show Cause and the charges therein contained, with said Secretary of Agriculture. (R. 81-83.)

On or about the 6th day of March, 1934, and prior to the filing of the Answers by the plaintiffs and appellees, and without further proceeding by the said Secretary of Agriculture, he, as the said Secretary of Agriculture, set the said Orders to Show Cause for hearing in Los Angeles, California, on the 16th day of March, 1934, and appointed one Arthur P. Curran, an officer and employee of the United States Department of Agriculture, as hearing and presiding officer, and in like manner appointed C. P. Dorr and Albert D. Hadley, officers and employees of said United States Department of

Agriculture, to represent the said Secretary of Agriculture as prosecutors at said hearings. (R. 84.)

On the said 6th day of March, 1934, all of the aforementioned hearings were consolidated. That plaintiffs and appellees, and each of them, specially and specifically objected to the jurisdiction of the presiding officer, said Arthur P. Curran, and of the Secretary of Agriculture, of and over the subject matter of the charges and of and/or over the persons or businesses of said plaintiffs and each of them, and objected to the holding of such hearing or trial, and moved that said proceedings and said Orders to Show Cause be dismissed upon the ground and for the reason that said presiding officer was not sitting as a court with jurisdiction to try the issues of said Orders to Show Cause and the Answers thereto; and further specially and specifically objected to such hearings upon all the grounds set forth in paragraphs XXIX and XLIX of the Supplemental Bill of Complaint for Injunction. (Tr., pp. 84 and 103.)

On the 31st day of May, 1934, R. G. Tugwell, Acting Secretary of Agriculture, issued a document entitled "Termination of License for Milk, Los Angeles Milk Shed," wherein and whereby he did by such order, terminate, effective on and after 12:01 A. M., Eastern Standard Time, June 1, 1934, said License No. 17, hereinbefore mentioned (Tr., p. 87); and thereafter, and on the 31st day of May, 1934, said Acting Secretary of Agriculture executed and issued a document entitled "License No. 57, License for Milk, Los Angeles, California, Sales Area," purporting to make the same effective on and after 12:01 A. M., Eastern Standard Time,

June 1, 1934, purporting to take such action under and by virtue of the provisions of said National Agricultural Adjustment Act. (Tr., p. 89.)

After the making of the objections before Arthur P. Curran, as hereinbefore set forth, and the overruling of such objection by the said Arthur P. Curran, and without consenting or acquiescing to the jurisdiction of the said Secretary of Agriculture, or any of his agents or employees, but expressly excepting thereto, testimony was introduced by the counsel and prosecutors for said Secretary of Agriculture, and the matters continued from time to time to and including the 18th day of June, 1934. On the 18th day of June, 1934, at Washington, D. C., in the continuance of said hearings, the said C. P. Dorr and Albert D. Hadley offered into evidence before the said Arthur P. Curran as such hearing and presiding officer, the order of the Acting Secretary of Agriculture, terminating License No. 17, hereinbefore referred to, which was received by said presiding officer and thereafter the said C. P. Dorr and Albert D. Hadley, as officers and employees of the said United States Department of Agriculture, offered into evidence a certified copy of the new License No. 57, hereinbefore referred to, which was received in evidence over the objections of counsel for the plaintiffs and appellees herein; and after said order admitting said License No. 57 into evidence at said hearing, the said C. P. Dorr and Albert D. Hadley as such officers and employees of the United States Department of Agriculture, moved to amend the Orders to Show Cause theretofore issued against each of the plaintiffs herein on the 21st day of

January, 1934, as hereinbefore set forth, which said amendments charged or attempted to charge each of the plaintiffs herein with the violation of said License No. 57, and to cite and order each of the plaintiffs herein to show cause why their said Licenses under said License No. 57 should not be suspended or revoked, by reason of each of said plaintiff's failure to comply with the provisions of said License No. 57, relating to their compliance with the provisions of said License No. 17. Plaintiffs herein, through their counsel, each severally objected to such amendments upon the ground that the same were not amendments, but were the issuance of new citations and did not comply with the rules promulgated by the said Secretary of Agriculture relating to the revocation or suspension of licenses. Despite such objection, said Arthur P. Curran as such presiding officer and as such officer and employee of the United States Department of Agriculture, permitted the filing of said amendments to said Orders to Show Cause, as hereinbefore set forth, and thereupon plaintiffs herein, not being personally present or receiving service of such amendments to such Order to Show Cause, or any citations thereon, were not therefore represented in person or by counsel authorized to represent them on such new or amended Orders to Show Cause, and plaintiffs, nor any of them, have at any time received or been served pursuant to said regulations, with copies of such citations or amended Orders to Show Cause under License No. 57, as to why their licenses under said purported License No. 57 should not be revoked or suspended. (R. 98-100.)

On or about the 28th day of July, 1934, said H. A. Wallace as such Secretary of Agriculture, issued orders revoking and terminating the licenses of plaintiffs under said License No. 57, and the right of each of the plaintiffs herein to engage in the business of distributing fluid milk and cream within such Los Angeles sales area was thereby terminated, effective on and after 6:00 P. M., Pacific Standard Time, on the 28th day of July, 1934. (Tr. 100.)

Each of the plaintiffs herein has, for many years last past, conducted, and were, on the said 28th day of July, 1934, conducting, carrying on and engaging in the business of producing and/or distributing milk and cream within that part of the State of California designated in said Licenses as Los Angeles sales area, and each maintained a plant containing machinery and other apparatus to handle and process milk and cream in accordance with sanitary requirements as prescribed by the laws of the State of California, and by ordinances of the several cities within which said plants were located. It is shown by the complaint and was not disputed in the Court below, that all milk and cream sold for human consumption in the Los Angeles sales area is produced wholly within the State of California. All milk and cream which is produced in the Los Angeles sales area is sold wholly within the State of California, with the exception that an amount estimated to be less than 1/10th of 1% thereof is sent out of the State of California at sporadic, irregular intervals by distributors other than the plaintiffs herein. None of the plaintiffs have at any time brought into the State of California, or shipped

out of the State of California, any milk or cream whatsoever, but have, during all of said time been engaged solely in intrastate commerce. (R. 101-102.)

Some surplus milk produced in the Los Angeles sales area is used for manufacturing purposes and is converted into butter, powdered milk and other by-products. Some of these products are shipped out of the State, but such shipment takes place after process of manufacture has been completed, and in many instances after the manufactured product has been sold here. None of the plaintiffs herein, however, have been so engaged.

The affidavit of E. W. Gomnitz produced by the defendants and appellants herein, shows that *no milk or cream was exported from or imported into the Los Angeles sales area during the years 1931, 1932 and 1933;* that the total domestic exports of dairy products from Los Angeles (none of which was fluid milk or cream and including shipments to other parts of California) during 1933, was 117,669 pounds, and that the imports of dairy products into the Los Angeles sales area consisted entirely of butter and cheese, and that such imports were of considerable volume. Said Licenses Nos. 17 and 57 were solely confined by their terms to fluid milk and cream sold for human consumption within the Los Angeles Sales area, and contained no regulations for the importation, exportation, manufacture, distribution or handling in any way or manner of butter, cheese or other by-products.

The acts of defendants and appellants which plaintiffs seek to restrain and enjoin, are sought to be justified by the provisions of Licenses Nos. 17 and 57 imposed by

the Secretary of Agriculture, and these Licenses are in turn sought to be justified by the provisions of the Agricultural Adjustment Act of 1933. The pertinent provisions of the Act are:

Sec. 1. *Declaration of Emergency.*

> "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

Sec. 2. *Declaration of Policy.* "It is hereby declared to be the policy of Congress:

> "(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909-July 1914."

Sec. 6. *General Powers.* "In order to effectuate the declared policy, the Secretary of Agriculture shall have power * * *

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof.

"Sec. 9. *Processing Tax.* (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor."

Section 9 provides for a processing tax to be paid by the processor upon the first domestic processing of the commodity and Section 19 provides that the taxes pro-

vided in the title shall be collected by the Bureau of Internal Revenue and paid into the Treasury of the United States. These provisions have not been followed in either License.

On the 16th day of November, 1933, the Secretary of Agriculture issued what is denominated "License No. 17, License for Milk, Los Angeles Milk Shed," effective November 20, 1933. This "License" purported to have been issued under the power conferred upon the Secretary by paragraph 3 of Section 8, of the Agricultural Adjustment Act.

Said License No. 17 recites that "the Secretary finds that the marketing of milk for distribution as fluid milk in the Los Angeles sales area and the distribution of said fluid milk are in both the current of interstate commerce and the current of intrastate commerce, which are inextricably intermingled." The appellants construe this to be a finding by the Secretary, binding on all people, that all milk handled in the Los Angeles sales area is handled in interstate commerce, even though it is entirely produced, distributed and sold within that small area in the State of California.

License No. 17 then provides that the Secretary "hereby licenses each and every distributor of fluid milk for consumption in the Los Angeles Sales Area to engage in the handling in the current of interstate or foreign commerce of said fluid milk, subject to the following terms and conditions."

Thus, it will be seen this was not a license in the ordinary acceptance of that word. No application for a license was required nor was any license issued to an

individual distributor. It was not a grant of a privilege to such as might apply, but was really a set of rules governing the conduct of the business of distributing fluid milk in the defined area only.

License No. 17, in "Exhibit D" attached thereto, creates the Los Angeles Milk Industry Board, to be composed of six producers, six distributors and a thirteenth member to be selected by a two-thirds vote of the twelve, and to be chairman of the board. It provides, in "Exhibit C" for the fixing of a "base" for each producer, to be determined by a percentage of his production from March 16, 1933, to June 15, 1933, some six months prior to the issuance of the license. It provides that Producers' Arbitration Committee, Inc., (now the appellant Milk Producers, Inc., the name having been changed) a private California cooperative corporation, will continue to operate a surplus plant to which is to be delivered all milk from producers in the Los Angeles Milk Shed having established bases in excess of the requirements of distributors as fluid milk, and that the losses of this surplus plant shall be charged against all deliveries of base milk whether to the surplus plant or to distributors.

License No. 17 provides that "distributors shall not purchase milk from any producer unless the producer authorizes the distributor (1) to pay over to Los Angeles Milk Industry Board an amount determined by it, not to be over ¼ cent per pound butterfat in all milk purchased; (2) if the producer is not a member of one of the five associations named, to pay over to Los Angeles Milk Industry Board an amount for each pound of butterfat equal to the average amount which the mem-

bers of those associations are then paying as dues; (3) to deduct each month (a) for deliveries in excess of base, the difference between the base price and the surplus price, and (b) for deliveries of base milk, the difference between the base price and the adjusted base price fixed by the Industry Board and Milk Producers, Inc." These deductions were to be paid to Milk Producers, Inc. Each distributor was also required to pay to the Industry Board, on his own account, up to ¼ cent per pound of butterfat purchased, and each producer-distributor was required to make all payments, including surplus, on his own production.

Thus, the price to be paid to producers was to be fixed each month by Los Angeles Milk Industry Board and Milk Producers, Inc. The milk income was to be spread over those producers who were in business on the dates named, thus discouraging new enterprises and causing a leveling of the income of the older operators. Those producers who had a market for their product, were to share their income with those who did not have such market. These plaintiffs, each of whom has by hard work built up a market for his milk, were compelled to pay a part of their income to Milk Producers, Inc., of which corporation none of the plaintiffs were members, in order that it might pay the uniform price to some other producer who may not have worked as hard, or may *not have had milk of equal quality,* or for some other reason did not have a market for his product.

The so-called production and surplus control plan first arbitrarily fixed the time from March 16th to June 15, 1933, as the "production base period."

A "marketing percentage" was to be arrived at by dividing the average daily deliveries of milk by all producers during the "production base period" into the daily average quantity of milk sold for consumption in the sales area during June, 1933.

The quota or "base" of each producer was to be arrived at by discovering his average daily production during the base period and applying the "market percentage" to that. For example, assume that the "marketing percentage" was determined to be 90; a producer whose average production during the "production base period" was 100 pounds of butterfat per day would be assigned a base of 90 pounds of butterfat per day. This would remain as his base whether his production increased or decreased. These "bases" were to be used in determining the amounts to be paid to producers for their milk.

What is called a "base price" to producers was fixed, to be changed from month to month as the price of 92 score butter changed on the Los Angeles market. When butter was 20 to 25 cents per pound, the "base price" was 51 cents per pound of butterfat; when the butter price was 25 to 30 cents, the base price was 61 cents.

However, the "base price" was not the price which the producer was to receive even for his "base" milk. It was the price which the distributor was to pay. Each month the Industry Board and Milk Producers, Inc., were to fix an "adjusted base price," which, after other deductions, was the amount the producer was to actually receive for his "base" milk. The distributor was required to deduct from the amount apparently due to the pro-

ducer various charges and pay the amounts thus deducted to the Industry Board and Milk Producers, Inc.

Thus, assume the case of a producer who had a "base" of 90 pounds of butterfat per day. when the "base price" was 51 cents, the "adjusted base price" fixed at 47 cents and the surplus price at 23 cents. This producer delivers 100 pounds of butterfat per day during one month of 30 days, or a total of 3,000 pounds during the month. At 51 cents per pound, this amounts to $1530.00. From this is deducted: (1) One-quarter cent per pound for the Industry Board, or $7.50; (2) 65/100 of a cent per pound because the producer is not a member of one of the named associations, or $19.50; (3) 3 cents per pound on all of his "base" milk, or 90% of his deliveries, amounting to $108.00; and (4) 28 cents per pound on all delivered in excess of his base, which was 300 pounds, amounting to $84.00. The total of these deductions is $219.00, leaving $1311.00 as the amount which the distributor may pay to the producer. The distributor must then add $7.50 as his contribution to the Industry Board and pay this, plus the $7.50 first deducted from the producer, plus the $19.50 of the deduction, or a total of $34.50 to the Industry Board, and pay the other deductions, amounting to $192.00 to Milk Producers, Inc. Milk Producers, Inc., may use a portion of this money to provide working capital for itself, and the balance in paying producers who delivered milk to it, the license providing that milk delivered to the surplus plant should be paid for at the same price as that delivered to distributors.

If the same producer, unaware that a license was to be issued, was unfortunate enough to have started in business after the 15th day of June, 1933, and prior to the date of the License, his base would have been fixed at about 22½ pounds per day and the result would be: (1) Deduct ¼ cent per pound, or $7.50; (2) deduct $19.50 for dues; (3) deduct 4 cents per pound on 675 pounds, or $27.00, and (4) deduct 28 cents per pound on 2325 pounds, amounting to $651.00, leaving $825.00 as the amount this producer would actually receive for his $1530.00 worth of milk.

The plaintiffs in this action are all in a class commonly referred to as distributors. None of them has ever used any of the facilities of the surplus plant. If they have a surplus of production, they find customers for it or carry it themselves. Notwithstanding these facts, they are, under the terms of the License, required to pay to the Industry Board and Milk Producers, Inc., amounts equal to the deductions required to be made from other producers and also the charge against distributors. These organizations claim the right to fix a "base" for each of them and for producers delivering milk to them and to collect the amounts of the deductions.

The charges of violations of the Licenses made against plaintiffs and each of them, and upon which the Secretary proceeded to try plaintiffs, consisted of the alleged failure of plaintiffs to meet the demands made upon them for such payments.

On the 31st day of May, 1934, R. G. Tugwell, Acting Secretary of Agriculture, made an order terminating

License No. 17, effective June 1, 1934, wherein it is ordered that the Secretary "hereby terminates the aforesaid license, but any and all obligations which have arisen, or which may arise in connection therewith, by virtue of or pursuant to such license, shall be deemed not to be affected, waived or terminated hereby."

On the 31st day of May, 1934, R. G. Tugwell, Acting Secretary of Agriculture, issued another document entitled "License No. 57—License for Milk—Los Angeles, California, Sales Area," effective June 1, 1934. This License also purports to have been issued under the power granted by paragraph 3, Section 8, of the Agricultural Adjustment Act. In it, the recital respecting interstate commerce is changed to read: "The Secretary finds that the marketing of milk for distribution in the Los Angeles Sales Area and the distribution thereof, are entirely in the current of interstate commerce, because said marketing and distribution are partly interstate and partly intrastate commerce and so inextricably intermingled *that said interstate commerce portion cannot be effectively regulated or licensed* without licensing that portion which is *intrastate commerce.*"

License No. 57 then provides that the Secretary "hereby licenses each and every distributor to engage in the business of distributing, marketing or handling milk or cream as a distributor in the Los Angeles Sales Area, subject to the following terms and conditions." The Los Angeles Sales Area is again defined as the territory within the boundaries of Los Angeles County, a portion of San Bernardino County, a portion of River-

side County, and Orange County, "all within the State of California."

License No. 57 contains a marketing plan which fixes the prices to be paid to producers, provides for the continuance and establishment of bases for producers and fixes minimum selling prices for distributors. It provides that the license shall be administered by a Market Administrator designated by the Secretary and who shall perform such duties as may be provided for him in the license." It provides that the Market Administrator shall be entitled to a reasonable compensation to be fixed by the Secretary; to borrow money to meet his cost of operation until such time as the first payments are made to him under the license and to incur such other expenses including compensation for persons employed by the Market Administrator, as the Market Administrator may deem necessary for the proper conduct of his duties and also that he shall not be held personally responsible in any way whatsoever to any licensee or to any other person for errors in judgment, mistakes of fact, or other acts, either of commission or omission, except for acts of dishonesty, fraud and malfeasance in office.

License No. 57 also provides that any distributor who does not sell or distribute whole milk for ultimate consumption in the Los Angeles Sales Area may purchase milk from producers who do not have established bases, and that such distributor is not subject to the terms of the license, except that he shall not sell cream to other distributors for distribution and ultimate consumption in the Los Angeles Sales Area at a price less than the

price at which he sells similar cream for consumption nearest to location where the milk is processed into cream, plus the cost of transportation.

License No. 57 also contains the following provision: "Each and every distributor shall fulfill any and all of his obligations which shall have arisen, or which may hereafter arise in connection with or by virtue of or pursuant to the license for milk in the Los Angeles Sales Area issued by the Secretary on November 16, 1933."

On the 11th day of January, 1934, plaintiffs and appellees commenced this action for the purpose of obtaining a judicial determination of the rights of plaintiffs and appellees; and thereafter, and on the 11th day of August, 1934, served and filed their notice of motion in the above entitlel cause for leave to file a Supplemental Bill of Complaint for Injunction herein; and on the 4th day of September, 1934, after argument thereon, the said Supplemental Bill of Complaint was ordered filed by the Hon. George Cosgrave, Judge of the District Court of the United States, in and for the Southern District of California, Central Division, and the Supplemental Bill of Complaint for Injunction was thereupon filed by the Clerk of said Court, and a temporary restraining order theretofore issued was continued in full force and effect, and thereafter, on the 20th day of September, 1934, said Court issued its preliminary injunction (Tr., page 254, et seq.) after full arguments and motions to dismiss.

ARGUMENT

The Existence of an Emergency Does Not Confer Additional Powers Upon the Federal Government

The Agricultural Adjustment Act recites that its enactment is prompted by a national economic emergency and it is argued that such emergency supports the Act and justifies the licenses.

An emergency, however, does not in any way enlarge the constitutional powers of the Federal Government.

This principle is well stated in the case of *Ex Parte Milligan,* 4 Wall. 2, 18 Law Ed. 281, in which the Supreme Court of the United States says:

> "Time has proved the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of many could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men forsaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great

> exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

In *U. S. v. Cohen Grocery Co.,* 255 U. S. 81, 65 Law Ed. 516, the charge was selling sugar at an unreasonable price, in violation of the statute passed during the late war prohibiting unjust or unreasonable charges in dealing in necessaries. The Court said:

> "We are of the opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

This principle is again stated by the Supreme Court in the late case of *Home Building & Loan Association vs. Blaisdell,* decided January 8, 1934, 78 Law Ed. 255, as follows:

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always

been, and always will be, the subject of close examination under our constitutional system."

It is true that emergency may furnish the occasion for the exercise of a power which already exists under the constitution. This principle is also clearly stated in *Home Building and Loan Association vs. Blaisdell*, supra, where the Court says:

> "While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.' Wilson v. New, 243 U. S. 332, 348. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented."

The National Government is one of limited powers. Section 8, of Article I of the Constitution defines the legislative powers which are vested in the Congress, and Article X, of the Amendments to the Constitution, provides, "The powers not delegated to the United States

by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

When the validity of an Act of Congress is drawn in question, the Court before sustaining such action, is bound to discover in the Constitution of the United States either an expressed or implied grant of authority to Congress to enact such legislation. When the acts of a Federal Officer are drawn in question, the Court, before sustaining such action, must find not only Constitutional authority to Congress to enact the law, but a legal delegation of authority to the officer who has assumed to act.

In this action the appellees challenge the Constitutionality of the Agricultural Adjustment Act as interpreted by the Secretary of Agriculture in issuing the licenses in question; they challenge the validity of the licenses, upon the grounds that the provisions of the licenses are beyond the power of the Secretary to impose, and beyond the power of the Federal Government, through any agency, to enact as law. The existence of an emergency therefore, does not affect the case.

The constitution does not give to the Federal Government any power to regulate commerce within a State. Emergency cannot confer such power. The Constitution vests all legislative power of the Federal Government in the Congress. Emergency cannot authorize the delegation to a Cabinet officer of the power to make a law. The Constitution authorizes Congress to levy taxes for governmental purposes. Emergency cannot confer upon Congress or the Secretary of Agriculture the power to levy taxes for private purposes. Neither can emergency confer upon the Federal Government the power to violate the amendments to the constitution.

Regulation of Intrastate Commerce Is Beyond the Power of the Federal Government

(1) The Power of the Federal Government Must Be Found Within the Constitution

The Constitution, by what is commonly referred to as the "Commerce Clause," Section 8 thereof, grants to Congress the power "to regulate commerce with foreign nations and among the several states." As the power of the Federal Government is one which must be sustained by the Constitution and one of delegated power from the several states, those powers not delegated being, by the 9th and 10th Amendments, expressly reserved to the respective States or to the people, any law enacted by Congress in that behalf must stand or fall by the test of the so-called "Commerce Clause." In other words, the acts of the Secretary of Agriculture in issuing the Licenses herein complained of must be predicated upon an Act of Congress lawfully passed under this grant of power, and therefore, unless the Licenses as issued by the Secretary are lawful regulations of *interstate* commerce they must fall as not being embraced within the subject of Federal jurisdiction.

U. S. vs. De Witt, 76 U. S. 41:

> "But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested."

Trade-Mark Cases, 100 U. S. 82:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

Hammer vs. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, 38 S. C. 529:

> "The control by Commerce over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution . . . The maintenance of authority of the states over matters purely local is as essential to the preservation of all institutions as is the conservation of the supremacy of the Federal power in all matters entrusted to the Nation by the Federal constitution."

The record before the court is plain—none of the plaintiffs are engaged in the business of distributing milk outside of the State of California, or, in fact, outside of a certain portion thereof (Complaint, para. 21, Transcript, page 21), (Supplemental Complaint, para, 35, Transcript, page 89), none of the milk so distributed is produced outside of the State of California, or, in fact, outside of a certain portion thereof, (Complaint, para.

21, Transcript, page 21), (Supplemental Complaint, para. 35, Transcript, page 89), out of the entire milk industry of California only an almost infinitesimal percentage of the milk produced (not distributed) goes outside of the State—less than 1/10th of 1% (Supplemental Complaint, para. 37, Transcript, page 95), and that in the form of manufactured milk products, articles not covered by the license. In fact the affidavits of E. W. Gaumnitz, filed by the defendants and appellants show conclusively that none of the businesses of any attempted licensee are in interstate commerce. (Trans., page 314).

(2) Interstate Commerce Has Been Specifically Defined By the Courts

Coe vs. Errol, 116 U. S. 517, 29 L. Ed. 715:

> "Goods do not cease to be part of the general mass of property in the state, subject as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey. * * * Some of the Western States produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produced them, they are part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true, it was said in the case of The Daniel Ball, 10 Wall. 565: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce

in that commodity between the states has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them to a depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to a depot is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation, it is no part of the exportation itself."

The Supreme Court in *The County of Mobile vs. Kimball,* 102 U. S. 691, 26 L. Ed. 238, and in *Kidd vs. Pearson,* 128 U. S. 1, 32 L. Ed. 346, gives this definition:

"Commerce with foreign nations and among the states, strictly considered, consists of intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."

In *Hammer v. Dagenhart,* 247 U. S. 251, 62 L. Ed. 1101, the court held the Child Labor Law unconstitutional, saying:

" 'Commerce' consists of intercourse and traffic . . . and includes the transportation of persons and

property, as well as the purchase, sales and exchange of commodities.' The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. Delaware L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. Rep. 902.

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. 'When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. * * *'

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

"The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution. * * *

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states,—a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter

> to which the Federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."

Howard v. Illinois C. R. Co., 207 U. S. 463; 52 Law Ed. 297:

This case involves the validity of the Employers Liability Act passed by Congress in 1906. The act was held unconstitutional because it embraced all transactions local and interstate of those engaged in interstate commerce and the provisions were not severable.

This opinion is long, but the court states that all the questions which arise concern the nature and extent of the power of Congress to regulate commerce. The following extracts from the opinion as written by Justice White illustrate the points we are making:

> "But it is argued, even though it be conceded that the power of Congress may be exercised as to the relation of master and servant in matters of interstate commerce; that power cannot be lawfully extended so as to include the regulation of the relation of master and servant, or of servants among themselves, as to things which are not interstate commerce. From this it is insisted the repugnancy of the act to the Constitution is clearly shown, as the face of the act makes it certain that the power which it asserts extends not only to the relation of master and servant and servants among themselves as to

things which are wholly interstate commerce, but embraces those relations as to matters and things domestic in their character, and which do not come within the authority of Congress. To test this proposition requires us to consider the text of the Act.

"From the 1st section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. * * * From this it follows, that the statute deals with all the concerns of the individuals or corporation to which it relates if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form the statute is addressed to the individuals or corporations who are engaged in interstate commerce business which such persons may do,—that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce. * * *

"The Act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subject wholly outside of the power of Congress to regulate commerce. * * *

"As the Act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon the authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the prop-

ositions advanced to show that the statute may be saved.

"On the one hand, while conceding that the act deals with all common carriers who are engaged in interstate commerce because they so engage, and indeed, while moreover conceding that the act was originally drawn for the purpose of reaching all the employees of railroads engaged in interstate commerce to this it is said the act in its original form alone related, it is not yet insisted that the act is within the power of Congress, because one who engages in interstate commerce thereby comes under the power of Congress as to all his business, and may not complain of any regulation which Congress may choose to adopt. These contentions are thus summed up in the brief filed on behalf of the government.

" 'It is the carrier, and not its employees, that the act seeks to regulate, and the carrier is subject to such regulations because it is engaged in interstate commerce. * * *'

" 'By engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress, and cannot be heard to complain of such regulations.'

"It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution;

in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

In *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 67 Law Ed. 237, it was contended that the products of a state that have, or are destined to have, a market in other states, are subjects of interstate commerce though they have not moved from the place of their production or preparation.

"The reach and consequences of the contention repel its acceptance. In the possibility, or, indeed, certainty, of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movements from the state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries; it would nationalize and

> withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production."

Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 67 Law Ed. 931:

Here the Court cites many authorities in support of the proposition that mining is not interstate commerce, but like manufacturing is a local business and that its character in this regard is not affected by the intended use or disposal of the property and persists even though the business be conducted in close connection with interstate commerce.

In *Utah Power & Light Co. v. Pfost,* 286 U. S. 165, 76 Law Ed. 1038, the Court held that the generation of electricity in one state for transmission to another state is not interstate commerce, because commerce does not begin until manufacture is finished. "Commerce succeeds to manufacture and is not a part of it."

Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129, 66 Law Ed. 166:

The Court held that the ginning of cotton is a step in the manufacture of both the seed and the fiber into

useful articles of commerce and that "manufacture" is not commerce; the fact that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce.

> "When the ginning is completed, the operator of the gin is free to purchase the seed or not; and, if it is purchased, to store it in Mississippi indefinitely, or to sell or use it in that state, or to ship it out of the state for use in another; and, under the cases cited, it is only in this last case, and after the seed has been committed to a carrier for interstate transport, that it passes from the regulatory power of the state into interstate commerce and under the national power.
>
> "The application of these conclusions of law to the manufacturing operations of the cotton gins, which we have seen precede but are not a part of interstate commerce, renders it quite impossible to consider them an instrumentality of such commerce."

In *Chassaniol v. Greenwood*, 291 U. S. 584, 78 Law Ed. 662, decided March 12, 1934, the Court says:

> "Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce."

Illinois Central Railroad Co. v. McKendree, 203 U. S. 514; 51 Law Ed. 298:

The Act of Congress in 1903 authorized the Secretary of Agriculture to make quarantine regulations to prevent the spread of diseases in cattle. Claiming to act under this law the Secretary established a quarantine line extending across the State of Tennessee and prohibited the transportation of cattle from points south of this line to points north of this line. In other words, attempted to regulate intrastate commerce as well as interstate commerce. This was Order No. 107. The Court did not decide whether this was an unlawful delegation of legislative authority to the Secretary. It held that the order of the Secretary was void because by its terms it applied as well to *intrastate* traffic as to *interstate* traffic, and said:

> "The terms of Order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the State of Tennessee from the south of the line as well as those from outside that state; there is no exception in the order, and in terms it includes all cattle transported from the south of the line, whether within or without the state of Tennessee. It is urged by the government that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the state line, when the state by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within

its terms if the cattle were brought from the south of the line to a point north of the line within the state of Tennessee. It is true the Secretary recites that legislation has been passed by the state of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from the south of the line, and, as we have said, the order in terms covers it. We do not say that the state line might not be adopted in a proper case, in the exercise of Federal authority, if limited in its effect to interstate commerce coming from below the line, but that is not the present order, and we must deal with it as we find it. Nor have we power to so limit the Secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible."

The authorities we have thus far cited establish conclusively the following propositions:

1. That the power of Congress to regulate *interstate* commerce is supreme and limited only by other provisions of the Constitution.

2. That neither Congress or any other agency of the Federal Government has any power whatever to regulate commerce which is conducted wholly within a state.

3. That one who engages in a business which is partly interstate and partly intrastate commerce, is subject to Federal regulation as to that part which is interstate,

but does not thereby subject himself to Federal regulations as to that part of his business which is intrastate.

4. That a law of Congress embracing regulations of interstate and intrastate commerce, such regulations being so interblended in the statute that they are incapable of separation, is unconstitutional and void in its entirety.

5. That a business which does not have any interstate transactions is not subject to Federal regulation.

6. That an order of the Secretary of Agriculture which undertakes to provide regulations which upon their face apply to both interstate and intrastate commerce in terms single and indivisible, is unconstitutional and void in its entirety.

(3) The Agricultural Adjustment Act By Its Provisions Does Not Contemplate Interference By Federal Authorities In Intrastate Business.

It is not the contention that the Agricultural Adjustment Act is unconstitutional insofar as the question of interstate commerce is concerned. The Act authorizes the Secretary of Agriculture to issue licenses permitting the handling of commodities "in the current of interstate or foreign commerce." The actions of Congress at the last session are sufficient to show their intention at the time of the passing of the Agricultural Adjustment act to be not to interfere in intrastate business as, indeed, will only a cursory examination of the language of the Act above quoted. The amended Act, Section 8, (3) which *failed to passage* during such session, reads in part as follows:

"Engaging in the handling of any agricultural commodity or product thereof, or any competing commodity or product thereof in the current of, or in competition with, or so as to burden, obstruct or in any way affect interstate or foreign commerce."

We therefore contend that the licenses as issued by the Secretary of Agriculture are unconstitutional and void because the Secretary of Agriculture, if the authority so to do is properly delegated to him, has undertaken by his licenses to cover transactions which are not interstate commerce and over which the Federal Government by their acting through Congress or any other agency has no jurisdiction whatever, and over which it is clear indeed that Congress did not intend to give the Secretary any jurisdiction. On this point we can do no better than cite a very recent case of *U. S. vs. Greenwood Dairy Farms, Inc.,* decided in the Southern District of Indiana, Indianapolis Division, by District Judge Baltzell on the 27th day of September, 1934.

(4) By Stating That the Business Affects Interstate Commerce, the Secretary Cannot Make the Same Interstate or Avoid the Application of Established Rulings.

In each of the licenses here involved, the Secretary has attempted to avoid the application of these rules by a recital that he finds the business to be interstate. Thus in License No. 17, issued in November, 1933, it is recited:

"Whereas, the Secretary finds that the marketing of milk for distribution as fluid milk in the Los

> Angeles Sales Area, and the distribution of said fluid milk, are in both the current of interstate commerce and the current of intrastate commerce, which are inextricably intermingled."

It, therefore, becomes necessary to consider this recital in the license and its effect, if any, upon the authority of the Secretary to impose the license in question upon the plaintiffs in this action.

First, we submit that this recital or finding by the Secretary cannot in any way change the facts as they exist nor can the Secretary in this manner convert *intrastate* commerce into *interstate* commerce.

As heretofore pointed out, interstate commerce has been so carefully, definitely defined and so uniformly held not to include production, that the facts in the instant case, read in the light of these rules, clearly preclude the giving of any weight to the Secretary's finding.

Secondly, we submit that License No. 17 did not purport to make any regulation whatever as to interstate commerce.

It is true that in defining what was licensed the Secretary followed the language of the Act and states as follows:

The Secretary of Agriculture,

> "Hereby licenses each and every distributor of fluid milk for consumption in the Los Angeles Sales Area to engage in the handling in the current of interstate or foreign commerce of said fluid milk subject to the following terms and conditions."

In other words each distributor of fluid milk in the Los Angeles Area was licensed to engage in the handl-

ing of fluid milk in interstate commerce, subject to the terms and conditions set out therein. If any distributor did not elect to engage in the handling of fluid milk in interstate commerce, then such distributor did not become a licensee under said license nor subject himself to any of the terms or conditions imposed. And further, so far as the matters now before the Court are concerned, the allegations of the Bill of Complaint must be taken as true, and it is alleged in paragraph XXV,

> "Each of the plaintiffs herein, at all times commencing with November 20, 1933, and extending to and including May 31, 1934, purchased and/or produced all of the milk used by him in the conduct of his business entirely and exclusively within the State of California, and also sold and distributed the milk produced or purchased by him entirely within said state, and none of said milk was produced or moved or shipped outside the State of California. None of the milk produced and/or purchased and/or sold and/or distributed by any one of the four plaintiffs herein, during the period of time commencing with November 20, 1933, and extending to and including May 31, 1934, was in, or ever entered into, the current of interstate and/or foreign commerce, but was and remained at all times entirely within the current of purely intrastate commerce."

So on the face of the purported license and the admitted facts, no one of plaintiffs here was a licensee under that license.

But the real vice in License No. 17 was, that while it purported to license only transactions in interstate com-

merce, all of the terms and conditions which it imposed had reference *only to purely local and intrastate transactions*, and were only applied by the defendants to business of that nature operated by the plaintiffs.

Thus it is provided that as used in the purported license "fluid milk" means milk, cream or any other of the articles listed in Exhibit B *which are sold for consumption in the Los Angeles Sales Area.* In other words, "fluid milk" embraces all of the items to which the license applies, and none of the terms or conditions imposed apply to any items unless it is *sold for consumption* in the Los Angeles Sales Area.

It is next provided that "Grade A. Market Milk" means that portion of fluid milk which is derived from milk produced in the Los Angeles Milk Shed and which is sold for consumption in the Los Angeles Sales Area as fluid milk, other than as fluid cream, and that "Grade A Market Cream" means that portion of fluid milk which is derived from Grade A. milk produced in the Los Angeles Cream Shed and which is sold for consumption in the Los Angeles Sales Area as fluid milk, other than as whole milk. The provisions of the license which it is charged plaintiffs have violated refer only to Grade A. Market Milk or Cream. Therefore, these provisions refer only to milk which is produced in the Los Angeles Milk Shed or Los Angeles Cream Shed and sold for consumption in the Los Angeles Sales Area. The Los Angeles Milk Shed is defined as being entirely within the Counties of Los Angeles, Riverside, San Bernardino and Orange and those dairy farms outside those counties which were producing milk for Grade A. Market Mi'k

on the effective date of the license. The Los Angeles Cream Shed is defined as embracing 10 counties in Southern California and the Los Angeles Sales Area is defined as entirely within the State of California and consisting of Los Angeles, and Orange Counties and portions of Riverside and San Bernardino Counties. Under these definitions none of these provisions of the license would have any application whatever to milk which at any time entered into intrastate commerce.

The purported license then defines "Producer" as meaning any producer or association of producers of milk produced in the Los Angeles Milk Shed and/or the Los Angeles Cream Shed and sold for consumption as fluid milk in the Los Angeles Sales Area; and "Distributor" is defined as meaning persons engaged in the business of handling fluid milk, and "Fluid Milk" is defined as that which is sold for consumption in the Los Angeles Sales Area. None of the terms or conditions of the license applicable to the distributor apply except as to sales for consumption in the Los Angeles Sales Area. On Page 15 of the License it is provided that distributors shall purchase all of their milk requirements of Grade A. Market Milk and Grade A. Market Cream for standardization purposes from producers having established bases in the Los Angeles Milk Shed, and shall purchase all of their milk requirements of Grade A Market Cream from the Grade A Milk producers in the Los Angeles Cream Shed. The prices to be paid to producers, as provided in Exhibit A apply only to Grade A Market Milk delivered F.O.B. distributors' processing plant in Los Angeles or certain other counties in

Southern California. According to paragraph 2, of Article III, the schedule of wholesale, re-sale and retail prices set forth in Exhibit B apply only to fluid milk which shall be distributed and sold by the distributors in the various parts of the Los Angeles Sales Area. Exhibit C, which sets out the rules for control of production, is applicable only to producers of Grade A Market Milk, or as that term is defined, to producers of milk produced in Los Angeles Milk Shed and sold for consumption in the Los Angeles Sales Area. The duties assigned to the Los Angeles Milk Industry Board, created under Exhibit D, are confined to the Los Angeles Market and the Cream Buying Plan set out in Exhibit A applies only to Grade A Milk which is delivered from producers in the Los Angeles Cream Shed.

At no place in this purported license is a single rule prescribed which is applicable to any interstate transactions. The milk to which it applies must be produced within the Los Angeles Milk Shed or within the Los Angeles Cream Shed; it must be delivered to distributors within the Los Angeles Sales Area, and it must be sold for consumption within the Los Angeles Sales Area. Every one of the terms and conditions prescribed by this purported license relates only to such transactions and those transactions are not interstate commerce.

License No. 57, issued May 31, 1934, goes even further in the finding with reference to interstate commerce and recites as follows:

> "The Secretary finds that the marketing of milk for distribution in the Los Angeles Sales Area and the distribution thereof, are entirely in the current

> of interstate commerce, because the said marketing and distribution are partly interstate and partly intrastate commerce and so inextricably intermingled that said interstate commerce portion cannot be effectively regulated or licensed without licensing that portion which is intrastate commerce."

Notwithstanding this recital, the facts as pleaded in paragraph XXVII, of the Bill of Complaint, stand admitted as the matter is now presented to the Court.

The license then proceeds:

> "Now, therefore, the Secretary of Agriculture, acting under the authority vested in him as aforesaid;
>
> "Hereby licenses each and every distributor to engage in the business of distribution, marketing or handling milk or cream as a distributor in the Los Angeles Sales Area, subject to the following terms and conditions."

Thus, it will be seen that the new license does not in any way purport to be applicable to interstate commerce. It licenses the distributors to engage in the business as a distributor in the Los Angeles Sales Area. It does not attempt to prescribe regulations for interstate commerce which may incidently apply to some local transactions. By its very language it excludes all regulations of interstate transactions and makes the terms and conditions apply only to the local transactions. To emphasize this meaning by License No. 57, it is provided in Exhibit A, attached thereto, that any distributor who does *not* sell or distribute whole milk for ultimate consumption in the Los Angeles Sales Area, may purchase

milk from producers who do not have established bases, and "shall not be subject to any of the terms or provisions of this exhibit," except that he shall not sell cream in Los Angeles at a reduced price. In other words, if he buys milk to ship out of the Los Angeles Sales Area, he is not subject to the license.

Thus we have this situation: None of the plaintiffs is or has been engaged in any transaction wherein any of the commodities dealt in by them pass from one state to another; the milk and cream produced by them is produced in the Los Angeles Sales Area; the milk and cream purchased by them is produced and sold to them in the Los Angeles Sales Area; all sales made by them are made in the Los Angeles Sales Area for consumption therein. As to the entire milk industry in the Los Angeles Sales Area, all milk and cream sold therein is produced within the State; all milk and cream produced therein is sold within the State, with the exception that at irregular times and intervals some distributors in said territory, other than these plaintiffs, sell and ship outside of the State of California small quantities of milk and cream after the same has been purchased within said territory and processed and prepared for shipment therein, and that the amount of milk and cream produced within said territory in the State of California which is thus transported outside of the State of California is less than 1/10 of one per cent of the production and is not intermingled with that used therein.

On these facts, can the Secretary of Agriculture convert the business of these plaintiffs into interstate commerce by a recital that he finds the distribution of milk

in the Los Angeles Sales Area to be entirely in the current of interstate commerce because it is partly interstate (less than 1/10 of 1%) and partly intrastate (over 99.9%) and inextricably intermingled, and can the Secretary thus acquire jurisdiction to regulate or prohibit that portion which is purely local and intrastate, without regulating that portion which is interstate? If either of these questions is answered in the negative, then the license must fall. If these two questions are answered in the affirmative, then there is no such thing as local or intrastate commerce, and every commercial activity is subject to regulation or prohibition by the Federal Government. It is probable that no other industry in the State of California is so far removed from interstate commerce as is the distribution of milk and cream in the Los Angeles Sales Area.

In their efforts to sustain these licenses, defendants have submitted the affidavit of E. W. Gaumnitz, in which is recited a large volume of government statistics, relating to dairy products in the United States, all of which, so far as we can see, have no bearing on this case. It shows that in 1933 there was shipped from California to Chicago a small quantity of butter and that a small quantity of cheese was shipped from California to New York and Chicago. It says that ½ or more of the butter received at Los Angeles comes from other states, and a larger percentage of cheese. It shows that *no* milk or *cream* was *shipped out of Los Angeles* during *1931, 1932 or 1933 and that none was brought in from outside territory.* It does show shipments in and out of the state of condensed and dried milk, the only

interstate movements being of manufactured products not covered by either license. (*Neither of which are covered by these licenses.*)

The affidavit argues that "the free flow of manufactured dairy products between different markets in response to price changes engineered by changing supply and demand conditions results in decidedly close correlation between the prices of dairy products in different markets," and that "the prices received by producers for fluid milk testing 3.5 per cent butterfat used for fluid consumption are closely related to the United States average farm price for butterfat."

The argument seems to be that because some commodities which are manufactured from milk or cream are shipped in interstate commerce to and from the State of California, therefore the entire business of producing, distributing and selling milk and cream in the Los Angeles Sales Area becomes "inextricably intermingled" in the "current of interstate commerce," thereby making all such transactions interstate commerce subject to regulation by the Federal Government.

(5) Finding of Secretary That Local Business Is "Inextricably Intermingled" With Interstate Commerce Is Refuted By Facts.

To support this finding the evidence would have to be that the milk produced and purchased and distributed by the plaintiffs, and the prices paid and obtained therefor, directly affected interstate commerce. This, however, is not the fact. The license itself deals with a purely local business of buying and selling milk within

the confines of a small portion of the State of California. As heretofore pointed out, the affidavit of E. W. Gaumnitz was introduced to sustain the appellants' position in this matter. The affidavit speaks for itself, however, and shows a wide gap between the markets of California and elsewhere, abridged only by shipments of a small quantity of butter and cheese. None of the products covered by the license are transported to or from the State of California. Applying the rules laid down by the authorities heretofore set forth as to when interstate commerce starts, it is readily seen that the operations of the plaintiffs, and in fact of all similarly situated in the so-called Los Angeles Sales Area, fall far short of mingling in interstate commerce or having any effect thereon. It will be noticed that this expression "inextricably intermingled" occurs neither in the Constitution nor in the Agricultural Adjustment Act under which is claimed by the appellants the purported license receives its validity.

(6) The Seeking to Justify Control of Intrastate Business Because It Is In the "Current of Interstate Commerce" Is Not Justified.

The expression "current of interstate commerce" does not occur in the constitution, and we submit that the decisions of the Courts do not justify its use in the manner in which it is used in the licenses.

We will refer to some of the cases which have been cited to support this position:

Swift & Co. v. United States, 196 U. S. 375, 49 Law Ed. 518.

The Court says:

"To sum up the bill more shortly, it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the livestock markets of the different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and finnally to get less than lawful rates from the railroads, to the exclusion of competitors. * * *

"One further observation should be made. Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not *accidental, secondary, remote, or merely probable.* On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single state, is an object of attack. * * * Moreover, it is a direct object; it is that for the sale of which the several specific acts and courses of conduct are done and adopted. Therefore, the case is not like United States v. E. C. Knight Co. 156 U. S. 1, 39 Law ed. 325, where the subject matter of the combination was manufacture, and the direct object monopoly of manufacture within a state. However likely monopoly to commerce among the states in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce

among the states in respect to such sales. The two cases are near to each other, as sooner or later must happen where lines are to be drawn, but the line between them is distinct. * * *

"* * * Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle. * * *

"The injunction follows the charge. No objection was made on the ground that it is not confined to the places specified in the bill. It seems to us, however, that it ought to set forth more exactly the transactions in which such directions and agreements are forbidden. The trade in fresh meat referred to should be defined somewhat as it is in the bill, and the sales of stock should be confined to sales of stock at the stock yards named, which stock is sent from other states to the stock yards for sale or is brought at those yards for transport to another state."

There the "current of commerce among the states" was a "constantly recurring course" of action by the parties themselves, with the "direct object" of affecting sales in interstate commerce, and the decree was limited to transactions where two states were involved.

Stafford v. Wallace, 258 U. S. 495, 66 Law Ed. 735, involved the validity of the Packers and Stockyards Act, which sought to regulate business done in interstate commerce. The question was whether the stockyards and sales made therein were interstate commerce subject to regulation by the Federal Government.

The Court says:

> "The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carloads and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, *and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another.* Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood

course of business. The stockyards and the sale are necessary factors in the middle of this current of commerce. * * *

"As already noted, the word 'commerce,' when used in the act, is defined to be interstate and foreign commerce. Its provisions are carefully drawn to apply only to those practices and obstructions which, in the judgment of Congress, are likely to affect interstate commerce prejudicially."

The distribution of milk in the Los Angeles Sales Area is not a "throat" through which any current of interstate commerce flows, nor are the transactions therein incident to any current flowing from one state to another.

In *Missouri v. Kansas Co.,* 265 U. S. 298, 68 Law Ed. 1027, the Court held the transportation of gas through pipe lines from one state to another, for sale to distributing companies, in interstate commerce. In the opinion other cases are considered and the point where interstate commerce ceases and intrastate commerce begins is stated, the Court says:

"With the delivery of the gas to the distributing companies, however, the interstate movement ends. *Its subsequent sale and delivery by these companies to their customers are retail is intrastate business and subject to state regulation.* Public Utilities Commission v. Landon, supra, p. 245. *In such case the effect on interstate commerce, if there be any, is indirect and incidental.* But the sale and delivery here is an inseparable part of a transaction in interstate commerce,—not local but essentially national in character,—and enforcement of a selling price in

such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the Commission stood at the state line and imposed its regulations upon the final step in the process at the movement the interstate commodity entered the state, and before it had become part of the general mass of property therein. See Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 261, 5 Sup. Ct. Rep. 1091. There is nothing in Pennsylvania Gas Co. v. Public Service Commission, 252, U. S. 23, 64 L. ed. 434, P. U. R. 1920E, 18, 40 Sup. Ct. Rep. 279, inconsistent with this view. There the Gas Company, a Pennsylvania corporation, transmitted gas from Pennsylvania into New York, and sold it directly to the consumers. The service to the consumers, which was the thing for which the regulated charge was made, was essentially local, and the decision rests upon this feature. Mr. Justice Day, in the course of the opinion, said (p. 31): 'The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state; nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.' The commodity, after reaching the point of distribution in New York, was subdivided and sold at retail. The Landon Case, so far as this phase is concerned, differs only in the fact that the process

of division and sale to consumers was carried on, not by the Supply Company, but by independent distributing companies.

"In both cases, the things done were local, and were after the business in its essential national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the Landon Case. *The business of supplying, on demand, local consumers, is a local business,* even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. *In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.* But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different states. The transportation, sale, and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national,—admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned.

Following this decision, it may be said that if a carload of milk were shipped from Nevada to Los Angeles and there sold to a distributor, the interstate transaction would include this sale, but when the purchas-

ing distributor delivered it to his customer, those transactions would be intrastate.

Simpson v. Shepard, 230 U. S. 352; 57 Law ed. 1511, at page 1540. Minnesota Maximum rate case. The Court says:

> "* * *
>
> "The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. *This is not to say that the nation may deal with the internal concerns of the state, as such,* but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter."

As we have pointed out, the licenses involved in the case now before the Court, attempt to directly regulate the local business. There is no regulation of interstate transactions which incidentally controls local transactions.

Florida v. United States, 282 U. S. 194, 75 L. ed. 291:

> "* * * The power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an *unjust dis-*

crimination against interstate commerce is not open to dispute. * * *

"* * * The property of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power the justification of the exercise of the federal power must clearly appear. * * *

"But to justify the commission in the alteration of intrastate rates, it was not enough for the commission *to merely find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission.* In dealing with unjust discriminationas between persons and localities in relation to interstate commerce the question is one of the relation of rates to each other. * * *"

Board of Trade v. Olsen, 262 U. S. 67 L. ed. 839, at page 848:

"* * * Appellants contend that the decision of this court in Hill v. Wallace, 259 U. S. 44, 66 L. ed. 822, 42 Sup. Ct. Rep. 453, is conclusive against the constituionality of the Grain Futures Act. * * *

"The question is whether the conduct of such sales is subject to constantly recurring abuses which are a burden and obstruction to interstate commerce, in grain. And further are they such an incident of that commerce, and so intermingled with it, that the burden and obstruction caused therein by them can be said to be direct? * * *"

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 398; 55 L. ed. 310:

> "* * * The manufacture or concentration on the wharves of the terminal company are but incidents, under the circumstances presented by the record, in the transhipment of the products in export trade, and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things, and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading, or whether their initial point was Galveston, or some other place in Texas. They were all destined for export, and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose. The case, therefore, comes under Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another state or been delivered to a carrier for transportation'."

Lemke v. Farmers Grain Co., 258 U. S. 50; 66 L. ed. 458:

Lemke was a grain buyer in North Dakota buying grain for shipment to other states and sought to enjoin the enforcement of the North Dakota Grain, Grading and Inspection Act. This Act, the court says, "Was a comprehensive scheme to regulate the buying of grain."

Under it such purchases could be made only by those holding license from the state, paying state charges for the same and acting under a system of grading, inspecting and weighing fully defined in the act and then subject to the power of the State Grain Inspection to determine the margin of profit which the buyer shall realize upon his purchase. We quote from the opinion:

> "There is practically no market in North Dakota for the grain purchased by complainant. The Minneapolis prices are received at the elevator of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his 'spread', or margin of profit. The purchases are generally made with the intention of shipping the grain to Minnneapolis. The grain is placed in the elevator for shipment, and loaded at once upon cars for shipment to Minneapolis, and elsewhere outside the state of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain,—Minneapolis, Duluth, or elsewhere. This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Embden is outside the state of North Dakota, and it is an unusual thing to get and offer from a point within the state. After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under Federal law.
>
> "That such course of dealing constitutes interstate commerce, there can be no question. * * * Being

such the state would not regulate the business by a statute which had the effect to control and burden interstate commerce.

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and Federal authority under facts presented, which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defiined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of Federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. *It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been delivered to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market.* That was the course of business and fixed and determined the interstate character of the transactions."

Eastern Air Transport v. South Carolina, 285 U. S. 147, 76 Law. Ed. 673.

Suit to enjoin collection of state tax on sale of gasoline for use by airplanes used in interstate commerce:

"Undoubtedly, purchases of goods within a state may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the state upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotive of an interstate carrier, or of the locomotive and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce."

These cases definitely settle that the Federal Government cannot regulate intrastate transactions, except as an incident to the regulation of interstate commerce, and there only when and to the extent that the local transaction is and creates a direct and substantial burden upon interstate commerce. It cannot so act where the effect upon interstate commerce is secondary, accidental or remote. If any effect, no matter how secondary, accidental or remote were sufficient to bestow jurisdiction upon the Federal Government, then all rules heretofore laid down upon the question of interstate commerce would be completely nullified, and the entire business of each and every state then placed under the direct supervision and control of the Federal authorities, depriving the states of their rights heretofore jealously preserved and protected. For once the bars were let down. Production and manu-

facture would be so regulated, whether the same entered into the flow of interstate commerce or not, because who could say what the effect of such production and manufacture would be upon like enterprises in other states, and yet, the only power delegated to the Federal Government is "to regulate commerce with foreign nations *and among the several states* and with the Indian tribels."

If, after the showing made by the plaintiffs herein, any doubt could exist as to whether their businesses are interstate or intrastate commerce, if the transaction takes place within one state, according to the rule laid down in the case of *Arkansas Railroad Commission vs. Chicago Rock Island Pacific Railroad Co.,* 274 U. S. 97, this doubt should be dissolved in favor of intrastate commerce.

(7) The Assumption of Jurisdiction Over Intrastate Business Under the So-called Commerce Clause Leads to Several Other Results Not Contemplated Under This Clause.

The first result immediately apparent is that the license fixes the prices to be paid for milk, and at which milk is to be sold. We can find no authority recognizing a power in Congress to fix prices either of labor or commodities. The case of Wilson vs. New approved such an act, but the force of this decision of course must be limited to the state of facts involved, the court holding there that the power existed and that the emergency then pending awakened the exercise of such power. The case is indeed an extreme one and as no power ever existed in Congress in the Federal Government to deal with intra-

state commerce, no emergency can awaken the exercise of it.

Under the guise of emergency the Federal Government imposes a license upon the sale and distribution of milk, and seeking authority for so doing from the commerce clause of the Constitution, the Federal Government seeks to control the volume of production of milk as a part of its scheme to restore general commodity prices. Under the authority of the cases heretofore stated,

Hamner vs. Dagenhart, supra;
Heisler vs. Thomas Colliery Co., supra,

and others, the control of production is not within the power of the Federal Government.

The purported licenses have the effect, by their price fixing, of stifling competition among the various milk distributors, and putting an end to the individual effort which has always been so jealously safeguarded by the courts of this country, places a premium upon the inefficient conducting of businesses, for it is a matter of common knowledge that some local distributors can conduct their businesses so as to sell their finished product at a lower price than others.

Such interference with the businesses can only be by the hands of local authorities, and then only under the "police power" and for the purpose of regulating the health, morals and welfare of the people. Such police power has never been conferred upon the Federal Government and has never been surrendered by the states, and is in no way contemplated under or by the language of the so-called "commerce clause" of the Constitution under which appellants must justify their acts complained

of herein. Any authorities under Interstate Commerce Commission Acts are not in point which refer to rates to be charged by railroads. Railroads have been constantly declared by the courts to be a public utility charged with a public interest, sharing certain special privileges, and subject to certain limitations. Milk is not and has not been declared to be such a public utility, and until it actually moves in interstate commerce is not an object of interstate commerce. The case of *Nebbia vs. New York,* 291 U. S. 502, is the only authority for the statement that a state in the exercise of its police power may regulate, by price fixing and other means, a large industry common to the state, and the same is in no way applicable to the facts of the instant case.

(8) Holdings of District Courts In Other Parts of the Country.

Appellants seek to justify the very ingenious but fantastic theory that the price paid for milk produced for distribution in the Los Angeles Sales Area and the price at which such milk is so distributed there creates a burden on interstate commerce, affects interstate commerce and affects the national flow of interstate commerce by applying the theories adopted by the courts in sustaining the various anti-trust laws and in holding that the same were valid. A reference to the Agricultural Adjustment Act itself and to the effect the licenses thereunder will have, discloses the fallacy of this attempted application. The Act itself, Part 2, Section 8, Subsection 2 in the following language:

> "The making of any such agreement shall not be held to be in violation of any of the anti-trust laws

> of the United States, and any such agreement shall be deemed to be lawful provided that no such agreement shall remain in force after the termination of this act,"

suspends as to the operation of any of the anti-trust laws.

A reference to one case alone, *Northern Securities Company vs. Un. S.,* 193 U. S. 197, will be sufficient to show the reasoning behind the sustaining of the anti-trust laws and behind the act of Congress in passing the same, that is, to remove any barriers from the free flow of interstate commerce. In other words, to remove anything by way of restraint of trade, price fixing or otherwise, which restricts and tends to stifle competition. The Licenses, however, prevent free competition in the production and sale of milk and set arbitrary prices to be ragidly followed by both the producer and the distributor, and in the instant case that regulation is forced upon a business of a purely intrastate nature contributing nothing whatsoever to the current or flow of interstate commerce.

The theory presented by appellants in the affidavit of E. W. Gaumnitz is indeed an ingenious one. The very earnest way in which the same is presented defeats its very purpose. It is too far fetched to be treated as a rational one, in fact reads as a desperate dying attempt to sustain that which by all rules of law and logic is impossible.

We have heretofore analyzed the cases relied upon by appellants in a presentation of this theory. Again we say that the theory is contradictory to the language expressed

by the licenses. The licenses in their operation deal with whole milk sales only in a small restricted local area covering the purchase of milk to producers within or adjacent to that area, and places no restriction upon prices to be paid for milk to be used in the manufacture or production of other dairy products which may or may not be shipped in or out of the State of California, and it in fact limits rather than assists such a flow of manufactured dairy products, if any there be, from out of the State of California by limiting the production of producers only to the actual needs of the local communities for distribution as fluid milk, and by putting a restriction on the production of excess milk which, in effect, does not limit or in any way restrict the prices of milk which might be produced for the manufacture of dairy products to be shipped, if any were shipped, in the course of interstate commerce.

The appellants' theory that the fixing of minimum prices which distributors must pay producers for milk distributed in the urban markets, such as Los Angeles, and we are dealing here solely with the Los Angeles Sales Area, is essential to the attainment of the exercise of the Federal commerce power and within the commerce power of the Federal Government because throughout the country, if while not in Los Angeles, a great volume of milk moves in interstate commerce, would have the effect of giving absolute authority to the Federal Government of the production, manufacture and sale of every and all commodities, which is contrary to the established rules of law long laid down and set forth in the cases heretofore cited.

Throughout a number of other states the question of the validity of milk licenses issued by the Secretary of Agriculture, under the alleged authorization contained in the Agricultural Adjustment Act, have come before a number of the District Courts. In numerous well written opinions, applying to such licenses and their enactment and to the terms of the Agricultural Adjustment Act purporting to authorize the same, the foregoing and long established principles of law relative to the power of the Federal Government to interfere in intrastate commerce, and the definitions of interstate commerce, the several judges of such districts, after considering and finding the various businesses of the purported licensees to be wholly in interstate commerce upon sets of facts similar or identical with those in the case at bar, have held that the Federal Government has no authority whatsoever to interfere with such intrastate businesses and that any effect such intrastate businesses would have upon interstate commerce would be secondary and remote.

Edgewater Dairy vs. Wallace (Northern Div. of Ill. 6/26/34), 7 Fed. Supp. 121;

U. S. vs. Greenwood Dairy (So. Dist. of Ind. 9/27/34);

Douglas vs. Wallace (Western Dist. of Okla. 10/17/34);

U. S. vs. Neuendorf (So. Dist. of Iowa 11/19/34);

Columbus vs. Wallace (No. Dist. of Ill 11/21/34).

It is interesting to note that apparently from the context of the opinion in several of these cases, an affidavit of E. W. Gaumnitz identical, or almost identical with that in the case at bar, was presented to the court, and

to note the court's comments thereon and also on the government's far fetched theory in each case that the intrastate and local purchase and sale of milk creates a burden upon interstate commerce.

Similar licenses, price restrictions and "Codes" under the National Industrial Relief Act, have also been before the courts and under these Federal Government interference with purely intrastate commerce has been held to be void, and the matter of intrastate commerce has been held not one of authority for the Federal Government, notwithstanding the language of the various Codes and of the N.R.A. Some of these cases are

U. S. vs. Suburban Motor Service Corp. (No. Dist. of Ill. 2/10/34) 5 Fed. Sup. 798;

U. S. vs. Licto (No. Dist. of Texas, 2/16/34) 6 Fed. Sup. 32;

Hart Coal Co. vs. Sparks (Western Dist. of Ky. 5/19/34) 7 Fed. Supp. 16;

Amazon Petroleum v. Ryan (5th Cir. 5/22/34) 71 Fed. 2d. 1;

U. S. v. Mills (Md. 7/12/34) 7 Fed. Supp. 547;

Irma Hat Co. vs. Code (No. Dist. of Ill. 7/31/34) 7 Fed. Supp. 687;

U. S. vs. Gerhart (Colo. 8/8/34);

U. S. vs. Koslend (Eastern Dist. of Mich. 9/5/34;

U. S. vs. Eason Oil Co. (Western Dist. of Okla 9/22/34);

Miss. Hardwood Co. vs. McClanda (Western Dist. of Miss. 10/6/34);

U. S. vs. Belcher (No. Dist. of Ala. 10/31/34);

Carter Kelley Lbr. Co. vs. U. S. (Texas 12/8/34; (in which no opinion was written but a permanent injunction granted)

The very able opinions written in the above entitled cases, while of course not conclusive upon this court, being from courts of inferior jurisdictions, however in our opinion enunciate the guiding principles of law determining the question now before this court, and can lead to but one conclusion, that is, that the District Court Judge granting the preliminary injunction on the grounds set forth in his opinion was correct.

From the authorities we conclude:

1. If milk were shipped from Los Angeles to another state, interstate commerce would not begin until after the milk had been produced, processed and prepared ready for shipment.

2. If milk were shipped from another state to Los Angeles, interstate commerce would cease as soon as it was delivered and came to rest at its destination.

No Court has ever ruled:

1. That an industry as a whole becomes interstate commerce, simply because some of these engaged in it may have interstate transactions.

2. That one who has no transactions in interstate commerce, becomes subject to Federal regulation because some one else in the same industry conducts an interstate business.

3. That the Federal Government, under the guise of regulating interstate commerce, can control production, manufacture or local distribution of any commodity.

The Deductions, Taxes, Charges and Excises Provided In the Licenses Are Not Authorized by the Agricultural Adjustment Act, and Are Unconstitutional.

The license imposes a tax assessed by the Secretary of Agriculture to be collected by an association of individuals, a private corporation or an appointee of the Secretary of Agriculture against the strict provisions of the Agricultural Adjustment Act. Section 9 of the *Agricultural Adjustment Act* provides:

> "(a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. * * * The processing tax shall be levied, assessed and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor."

Section 12 of the *Act* provides as follows:

> "(a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage or reduction in production for market under part 2 of this title. Such sum shall remain available until expended.
>
> "(b) In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the fol-

lowing purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection."

Section 19 of the *Act* provides:

"(a) The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States."

Declaration of Policy of the *Agricultural Adjustment Act,* paragraph 2:

"It is hereby declared to be the policy of Congress—

"(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period."

Nowhere in the Act is there any provision that is contrary to the Declaration of Policy, which by its plain

terms shows the intention of Congress to increase the purchasing power of farmers, and nowhere in the Act is there any provision providing for the payment of any expense, fee, tax by producers (farmers) of agricultural commodities. In the face of this, however, License No. 17, in Article III, paragraph 4 (b), to and including paragraph 5 (c) thereof, imposes charges, expenses or taxes upon producers of agricultural commodities against the express terms of the Agricultural Adjustment Act. These expenses, charges or taxes under the provision of said License No. 17, are to be fixed and determined by the Los Angeles Milk Industry Board, an association of individuals, and by Producers Arbitration Committee, Inc., whose name was thereafter changed to Milk Producers, Inc., and which sums are, under the terms of the License, to be collected by such association of individuals known as Los Angeles Milk Industry Board and Milk Producers, Inc., a corporation organized and existing under and by virtue of the laws of the State of California.

As heretofore pointed out, the provisions of the Agricultural Adjustment Act are plain in their terms (Section 19):

> "The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States."

Plainly, from the terms of the Agricultural Adjustment Act, the only tax that can be imposed is a pro-

cessing tax to be paid by the processor at the first processing of the commodity.

License No. 57 provides for similar charges to be assessed and collected through the operation of an adjustment account maintained by the Market Administrator, as provided in Exhibit A of such License.

Manifestly, therefore, the Licenses and each of them, are issued directly in violation of the plain terms of the Agricultural Adjustment Act and contrary to the Declaration of Policy by Congress, for the following reasons:

1. The Agricultural Adjustment Act by its terms provides for no payment by, or deduction from, a producer (farmer).

2. The Agricultural Adjustment Act by its terms provides for the payment of expenses of administration of the Act out of the Congressional appropriation (Section 12) of $100,000,000, and does not provide for any payment of expenses by any portion of the agricultural industry.

3. No processing tax has been fixed or levied by the Secretary of Agriculture, and no other tax is provided for by the Agricultural Adjustment Act.

4. The excise tax attempted to be levied by the Licenses is not provided for by the Agricultural Adjustment Act.

5, The excise tax attempted to be levied by the Licenses is not payable to the Collector of Internal Revenue of the United States nor paid into the treasury of the United States, as provided by Section 19 of the Act.

6. The taxes, excises or charges attempted to be levied by the Licenses are not uniform in their method of collection.

7. The taxes, excises or charges attempted to be levied by the Licenses are not uniform throughout the United States.

8. That such taxes, excises or charges attempted to be levied and collected under the provisions of such Licenses are prohibited by and in contravention of Article I, Section 8, Clause 1 of the Constitution of the United States, in the following particulars:

(a) That such taxes, excises or charges are not to pay the debts or to provide for the common defense and general welfare of the United States.

(b) That such taxes, excises or charges are not uniform throughout the United States, but by the provisions of the Licenses and each of them, are only applicable to a small part of the State of California and are only attempted to be levied and collected wholly within a part of the State of California.

The Supreme Court in the case of *City of Los Angeles v. Lewis,* 175 Cal. 777, said:

> "A legislative act authorizing taxation for a private purpose is unconstitutional, as under our system of government taxes can be laid only for a public object."

Taxes are of two kinds—direct and indirect. Under the Constitution, direct taxes are apportioned among the several states, and indirect, such as duties, posts and excises, must be uniformly applied under the Constitu-

tion, and shall operate precisely in the same manner upon all individuals. See *Knowlton v. Moore,* 178 U. S. 47, 83, 84, 86, 88.

The Supreme Court in *Patton v. Brady,* 184 U. S. commencing at page 617, defines the term "excise" as applied to taxes, and at page 622, said:

> "* * * the Constitution, art. 1, sec. 8, provides that 'all duties, imposts and excises shall be uniform throughout the United States.' The exercise of the power is, therefore, limited by the rule of uniformity. The framers of the Constitution, the people who adopted it, thought that limitation sufficient, and courts may not add thereto. That uniformity has been adjudged to be a geographical uniformity."

In *Bromley v. McCaughn,* 280 U. S., at page 138, the Court again said:

> "The uniformity of taxation throughout the United States enjoined by Article I, paragraph 8, is geographic, not intrinsic."

How then can this excise be one not prohibited under Article I, paragraph 8, of the Constitution, when this tax is attempted to be applied within a small portion of the State of California? This Court will take judicial notice that these same commodities, to-wit, milk and cream, are produced throughout the United States.

These taxes, charges or excises are further repugnant to the due process clauses of the Fifth and Fourteenth Amendments to the Constitution, in that they are not affected with a public interest. In *Tyson v. Banton,* 273 U. S. 418, the Court said: (At page 429.)

"* * * the real inquiry is whether every public exhibition, game, contest or performance, to which an admission charge is made, is clothed with a public interest, so as to authorize a lawmaking body to fix the maximum amount of the charge, which its patrons may be required to pay.

"In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, Case of the State Freight Tax, 15 Wall. 232, 278, and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments. See City of Carrollton v. Baxxette, 159 Ill. 284, 294. The power to regulate property, services or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all."

At page 430:

"The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 246, but exists only where the business or the property involved has become 'affected with a public interest.'

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such

as arises from the mere fact that the public derives benefit, accomodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right', that synonym more nearly than any other expresses the sense in which it is to be understood."

At page 431:

"And finally, the mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry. Wolff Co. v. Industrial Court, 262 U. S. 522, 536."

The Attempt by the Secretary of Agriculture to Forfeit the Alleged License #57 as to Appellees For Alleged Violations of License #17, Is In Effect an Attempt to Prosecute Appellees Under an Ex Post Facto Law.

In *Thompson v. Utah*, 170 U. S. 343, at page 351, the Court said:

"It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of ex post facto laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and 'in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.' United States v. Hall, 2 Wash. C. C. 366; Kring v. Missouri, 107 U. S. 221, 228; Medley, Petitioner, 134 U. S. 160, 171."

In *Duncan v. State of Missouri,* 152 U. S., at page 377, the Court said: (Page 382.)

> "It may be said, generally speaking, that an ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage; Cummings v. Missouri, 4 Wall. 277; Kring v. Missouri, 107 U. S. 221."

License No. 57 was promulgated by the Secretary of Agriculture to become effective on the 1st day of June, 1934, and as set forth in the Bill of Complaint herein, all violations alleged against the plaintiff concerning License No. 17 are charged to have occurred long prior to such date. The proposition of law is too simple to take up the time of this Court in a further or extended argument on this point.

Paragraph (3) of Section 8, of the Agricultural Adjustment Act Is Unconstitutional Because It Delegates Legislative Authority to the Secretary of Agriculture.

The Agricultural Adjustment Act provides: "In order to effectuate the declared policy, the Secretary of Agriculture shall have power:

> "(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign

commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof."

The declared policy is stated in Section 2 of the Act, as follows:

"(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the pre-war period, August 1909-July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919-July 1929.

"(2) To approach such equality of purchasing power by gradual correction of the present inequalities at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

"(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products

> derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period, August 1909-July 1914."

From a reading of these provisions, five things stand out:

(1) The Act purports to give to the Secretary the power to issue licenses whereby he fixes such terms and conditions for the conduct of the business licensed as in his judgment will eliminate unfair practices or charges that prevent or tend to prevent the establishing and maintaining of such balance between production and consumption as will reestablish prices to farmers;

(2) It entirely fails to set up any standard of unfair practices or charges to operate as a guide to or limitation upon the power of the Secretary;

(3) It entirely fails to indicate the nature of any means to be adopted by the Secretary to protect the effectuation of the declared policy;

(4) It entirely fails to define any act or the nature or character of any act which it intends to make unlawful;

(5) It authorizes the Secretary to prescribe the rules for conducting the business licensed—to make the law which is applicable to such business.

Section 1, of Article I of the *Constitution of the United States* provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

In *United States vs. Eaton,* 144 U. S. 677; 36 Law Ed. 591, the Court says:

> "It was said by this Court in Morrill vs. Jones, 106 U. S. 466, that the Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carrying into effect what Congress has enacted. * * *
>
> "Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle law that an offense which may be the subject of criminal procedure is an act committed, or omitted, 'in violation of the public law, either forbidding or commanding it.' "

In *Field v. Clark,* 143 U. S. 649; 36 Law Ed. 294, p. 310, the Court says:

> "*That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.* The Act of October 1st, 1890, in the particular under consideration, is not inconsistent with that principle. It does not in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea and hides, Congress itself determined that the provisions of the Act of October 1st, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reci-

procally equal and reasonable. Congress itself prescribed, in advance, the duties to be levied, collected, and paid on sugar, molasses, coffee, tea, or hides, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. * * * As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the Act of Congress. It was not the making of law. He was the mere agent of the law making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugar, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency and that in case of such suspension certain duties should be imposed."

In the case last cited, the Court quotes approvingly from *Lock's Appeal*, 72 Pa. 491, as follows:

> "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some facts or state of things upon which the law makes, or intends to make, its own action depend."

It also quotes approvingly the following language from *Cincinnati Co. vs. Clinton County Commissioners,* 1 Ohio St. 88:

> "The true distinction is between the delegation of power to make the law which necessarily involves a discussion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

We do not question that Congress may authorize an administrative officer to make regulations for the purpose of supplying administrative details in carrying a law into effect. But Congress cannot delegate the authority to make the law—that is, to prescribe the rule of conduct.

The rule is well stated in *Wichita Railroad & L. Co. v. Public Utilities Commission,* 260 U. S. 48, 67 Law Ed. 46, as follows:

> "The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the state. The latter, qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."

The Act here in question does not enjoin upon the Secretary any course of procedure nor does it prescribe any rules of decision in the performance of his functions.

The following cases illustrate the difference between administrative regulation and legislation:

U. S. v. Verde Copper Co., 195 U. S. 207; 49 Law Ed. 449:

The Act of Congress granted permission to fell and remove timber on public lands for "building, agricultural, mining, and other domestic purposes," and provided that the felling and use of timber shall be, "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth upon such lands, and for other purposes." No. 7 of the Regulations promulgated by the Secretary provided, "no timber is permitted to be used for smelting purposes." The Court says:

> "But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authorization and final construction to the statute. This, we think, is beyond his power. * * * If Rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. *Such power is not regulation; it is legislation.*"

Morrill v. Jones, 106 U. S. 466; 27 Law Ed. 267:

The Revenue Law provided that animals for breeding purposes should be admitted free of duty upon proof thereof, satisfactory to the Secretary of the Treasury, and under such regulations as he might prescribe. The

Treasury regulations provided that before such animals were admitted free, the Secretary must be satisfied that the animals are of superior stock, adapted to improving the breed in the United States. We quote from the opinion:

> "The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of "superior stock." This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

Southern Pacific Co. v. Interstate Commerce Com., 219 U. S. 433; 55 Law Ed. 283:

> "Applying these propositions, the insistence is that, both in form and in substance, the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of

upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which, in and of itself, in a legal sense, might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so. * * *

"Coming to the consideration of that subject we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

In *Ex Parte Cox*, 63 Cal. 21, the Court says:

"The legislature had not authority to confer upon the officer or board the power of declaring what acts should constitute a misdemeanor. The legislative power of the state is vested in the Senate and Assembly. That power could not, as to the case before us, be delegated to the officer or board. The act before us does not say it shall be unlawful to import, distribute, or dispose of infected articles, but it attempts to confer upon the officer and board the power to so declare."

Dougherty v. Austin, 94 Cal. 601, we quote, commencing on page 605:

> "The question is thus squarely presented whether it was competent for the legislature thus to delegate to the board of supervisors of that county the power to change or suspend that part of the general law fixing the salaries of county officers, which provided that the county clerk of Marin County should himself pay the deputy or deputies employed by him. There can be, under well-settled principles of constitutional law, but one answer to this question, and that is one which denies to the legislature any right to thus delegate to any other body or tribunal what is most clearly a legislative power, the exercise of which the constitution has confided to that department of the state alone. This principle is one so universally accepted as true, that Judge Cooley, in his work on constitutional limitations, states it as a maxim of constitutional law. He says: 'One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.' (Cooley on Constitutional Limitations, p. 117)."

Schaezlein v. Cabanuss, 135 Cal. 466; on page 469, it is said:

> "It is no invasion of the right of the employer freely to contract with his employee, to provide by general law that all employers shall furnish a reasonably safe place and reasonably wholesome surroundings for their employees. The difficulty with the present law, however, is, that it does not provide, but that it is an attempt to confer upon a single person the right arbitrarily to determine not only that the sanitary condition of a workshop or factory is not reasonably good, but to say whether, even if reasonably good, in his judgment, its condition could be improved by the use of such appliances as he may designate, and then to make a penal offense of the failure to install such appliances. 'The very idea that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' (Yick Wo v. Hopkins, 118 U. S. 356.)"

In *Englebretson v. Industrial Accident Commission,* 170 Cal. 793, it was held that the power given by the constitution and by the act of the legislature to the Industrial Accident Commission "to regulate and prescribe the nature and extent of the proofs and evidence" does not authorize the Commission to act on hearsay testimony. The Court says, at page 797:

> "It is obvious that if this section would have the effect to confer upon the commission power to enact laws prescribing the nature and extent of proof necessary to make out a case, it would be a delegation

to the commission of the powers of the legislature to that respect. No authority for such delegation of power is given by Section 21 of Article XX of the constitution, in pursuance of which the Workmen's Compensation Law was enacted, and which constitutes the only authority for the provision authorizing such matters to be determined by the commission instead of by the courts. Being an improper delegation of authority, the aforesaid provision of subdivision 6 is wholly unauthorized and would have no effect, even if the commission had acted on it. It is not shown that the commission has made any order or rule declaring the nature and extent of the proofs and evidence required in cases under the law.

"The main reliance is upon the provision that the commission should not be bound 'by the technical rules of evidence,' and upon the general effect of the act in prescribing an informal and expeditious method of procedure. We cannot agree to the proposition that the rule against the admission of hearsay evidence as proof of a fact is a mere technical rule of evidence."

In re Peppers, 189 Cal. 682, the Court says, at page 688:

"It is our conclusion that the legislature had no power to thus delegate to an administrative board or officer its exclusive power and function of determining what acts or omissions on the part of an individual are unlawful."

The authority to the Secretary of Agriculture to issue licenses subject to such terms and conditions as may be necessary to eliminate unfair practices or charges that prevent, or tend to prevent, the effectuation of the

declared policy and the restoration of normal economic conditions in the marketing of such commodities and the financing thereof, is an attempt to confer upon the Secretary purely legislative powers. It attempts to authorize the Secretary to determine what terms and what conditions are necessary to eliminate unfair practices or charges that prevent or tend to prevent the restoration of economic conditions. It substitutes the judgment of the Secretary upon this very disputed subject matter for the judgment of Congress.

It attempts to authorize the Secretary to determine what are "unfair practices or charges;" what laws are necessary to eliminate the same; what are "normal economic conditions," and what acts prevent or tend to prevent the restoration of such conditions. It authorizes the Secretary to say what acts shall be lawful and what acts shall be unlawful. That is legislation.

Not only does this language attempt to confer upon the Secretary of Agriculture legislative powers in violations of the Constitution, but the language is so uncertain and indefinite as to make it impossible of enforcement.

United States v. Cohen Grocery Co., 255 U. S. 81; 65 Law Ed. 516.

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words 'That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constitute a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation

against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the Court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalize and punish all acts detrimental to the public interest when unjust and unreasonable in the estimation of the Court and jury.

"That it results from the consideration which we have stated that the section before us was void for repugnancy to the constitution is not open to question."

Cline v. Frink Dairy Co. 274 U. S. 445; 71 Law Ed. 1146:

"The anti-trust law of Colorado was held unconstitutional because it violated the Fifth Amendment. Inasmuch as it contained provisions that no agreement shall be deemed unlawful, the basis and purposes of which, are to conduct operations at a reasonable profit or to market at a reasonable profit those products that cannot be otherwise so marketed. 'When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detail restriction

of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impractical standard for the jury's decision.

"A Legislature must fix a standard more simply and more definitely before a person must conform or a jury can act."

Applying the language of these cases, we may say, in regard to the particular provision of the Agricultural Adjustment Act, herein involved, that the Act, by its terms, merely penalizes and punishes all acts which in the estimation of the Secretary of Agriculture constitute unfair practices or charges and which in his judgment tend to prevent the restoration of what he may deem to be normal economic conditions. Can there be any doubt that the determination of these questions by the Secretary *is legislation by him?*

Each License Is Void Because the Secretary Thereby Undertakes to Exercise Legislative Authority.

Each of the Licenses involved in this litigation undertakes to enact the law under which the business of producing and distributing milk in the Los Angeles Sales Area may be conducted. If the Act confers upon the Secretary the power to enact such laws (and the Secretary has definitely placed that construction upon it), then, as we have seen, that part of the act is unconstitutional; if the Act should not be construed as delegating such legislative power to the Secretary, then the Secretary has undertaken to enact laws without even a delegation of power. In either view of the case the

licenses are void, because the Secretary has thereby undertaken to legislate.

We will consider some of the particulars wherein the Secretary, by these licenses, has deemed to exercise legislative functions—

(1) By paragraph D, of Article I of License No. 17, there is created a district known as "Los Angeles Sales Area" and the boundaries thereof are defined, and Article III makes the license applicable only to distributors "of fluid milk for consumption in the Los Angeles Sales Area;" by paragraph E, of Article I another district, known as "Los Angeles Cream Shed" is created and its boundaries defined, and by paragraph F another district, known as "Los Angeles Milk Shed" is created and its boundaries defined. Paragraph C, of Article I of License No. 57 also creates a district known as "Los Angeles Sales Area" and defines its boundaries and that license is made applicable only to those who distribute, market or handle "milk or cream as a distributor in the Los Angeles Sales Area."

The creation of districts of the kinds here mentioned are purely legislative acts.

People v. Parks, 58 Cal. 624-643, we quote from the opinion:

> "To declare a public purpose, and to create a district over a designated area of the State, in which that purpose shall be accomplished, and to provide ways and means for its accomplishment, *are matters which belong exclusively to the Legislature.* If a necessity exists for the construction of public improvements within the State for a public purpose,

> the Legislature must declare it. *If a district has to be created over an area of the State the Legislature must create it, and establish its limits.* If property within it will be benefited by the improvement, the Legislature must determine it, and prescribe the rules upon which taxation must be apportioned. There are powers conferred upon it alone by the Constitution, and it cannot delegate them to any other department of the government, or to any agency of its appointment, *because it would be confiding to others that legislative discretion which legislators are bound to exercise themselves, and which they cannot delegate to any other man or men to be exercised."*

Judge E. M. Ross, then a member of the Court, in a concurring opinion, said:

> "The establishment of such districts is a legislative function, to be exercised by a legislative body; and the Legislature is expressly prohibited by the Constitution of the State from clothing any of its *executive* officers with such power."

(2) Paragraph 1 of the terms and conditions set out in Article III of License No. 17 provides that "The schedules giving the prices at which the terms and conditions under which milk shall be purchased by distributors for distribution as fluid milk shall be those set forth in Exhibit A, which is attached hereto and made a part hereof. Exhibit A fixes the price to be paid to producers. Paragraph 2 of the same article provides that the wholesale and retail prices at which fluid milk shall be distributed and sold in the various parts of the Los Angeles Sales Area shall be those set forth in Exhibit B. Exhibit B contains many schedules for fixing

different selling prices for different territorial areas within the Los Angeles Sales Area.

These price-fixing provisions are clearly legislative acts. Not only is this true, but they are entirely beyond the purview of the Act. *At no place in the Act is there any language to indicate an intention to attempt to confer upon the Secretary of Agriculture the power to fix the price at which the producer may sell his agricultural product* to the distributor, or the price at which the distributor may sell such product to the consumer. They are purely *attempts* by the *Secretary to enact laws without any semblance of a grant of authority,* whether such grant be valid or invalid.

(3) Paragraph 1 of Article II of License No. 57, provides that the prices and the terms and conditions under which distributors shall purchase milk from producers shall be those set forth in Exhibit A. Exhibit A sets out an elaborate marketing plan which fixes the price to be paid to producers and covers many other subjects. Said paragraph 1 also provides that any contract or agreement entered into between any distributor and producer prior to the effective date of this license, covering the purchase of milk shall be superseded by the terms of the license. Paragraph 2 of said Article II also provides that no distributor shall purchase milk from producers except those having bases as provided in Exhibit A; it also fixes the minimum prices and terms under which milk and cream may be sold by distributors as set forth in Exhibit C, and contains a similar provision abrogating contracts between distributors and any person for the sale or delivery of milk or cream.

Here the Secretary assumes to enact a law fixing the prices at which business may be done defining and limiting producers with whom the distributor may deal and abrogates contracts previously made with producers or with consumers. Will any one maintain that such provisions are not legislation? The Act does not assume to authorize such legislation by the Secretary. There is nothing in the Act which indicates an intention to authorize the Secretary to abrogate existing contracts.

(4) Paragraph 3 of Article III of License No. 17, provides that every distributor shall purchase and distribute milk in accordance with the production and control plan set forth in Exhibit C attached to the license. Exhibit C fixes a "production base period" and defines it as the period March 6, 1933 to June 15, 1933—about six months previous to the effective date of the license. It provides for a "market percentage" to be arrived at "by dividing the daily average of the total deliveries of all producers who shipped milk during the production base period into the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area during the month of June, 1933," and establishes a base for each producer who was marketing milk during the base period which is to be arrived at by taking his average daily deliveries during the production base period and applying the market percentage thereto. The resulting figure to be his established base. Producers who went into business after March 16 or before June 15, 1933, are to have their bases fixed at approximately one-half of their production; producers starting business after June 16, 1933, have their bases fixed at approximately one-quarter of their production.

Exhibit B of License No. 57 continues the allotment of bases. The provisions of both licenses are lengthly and complicated, but the net result is that a producer is to be paid one price for what is denominated his "base milk" and a lower price for milk delivered in excess of his base. The price to be paid for each class of milk is to be determined under License No. 17 by the Los Angeles Milk Industry Board and Milk Producers, Inc.; under License No. 57, it is to be determined by the Market Administrator. These provisions are all legislative. If Congress had undertaken to authorize the Secretary to promulgate these rules, that would have amounted to a delegation of legislative authority, but the Act does not contain any such provision. It does, in paragraph 1 of Section 8, authorize the Secretary to provide for reduction in production for market of any basic agricultural commodity *through agreements with producers* or *by other voluntary methods,* and to provide for *rental* or *benefit payments* in *connection therewith* in such amounts as the Secretary deems fair and reasonable to be paid out of any monies available for such payments. At no place in the Act is the Secretary authorized to enact legislation which deprives the producer of the right to market his product nor does it say that the producer must accept the greatly reduced price for his product simply because he did not happen to be marketing the same quantity of that product at a time six months before the Secretary acted. These provisions cannot be viewed in any light, except that the Secretary has undertaken to legislate and that therefore his acts are void.

(5) License No. 17, in Exhibit B, attached thereto, creates the Los Angeles Milk Industry Board. The license makes this board and Milk Producers, Inc., a private California corporation, the agencies for carrying out the provisions of the license. License No. 57 creates the office of Market Administrator, and in Section E of Exhibit A prescribes his duties and compensation. He is required to furnish an official bond contingent upon the faithful performance of his duties as such Market Administrator.

The creation of offices and the assignment of their compensation is a legislative function.

> *Cochnower v. U. S.*, 248 U. S. 405; 63 Law Ed. 328;
> *Glavey v. U. S.*, 182 U. S. 595; 45 Law Ed. 1247.

(6) Subdivision B of paragraph 4 of Article III of License No. 17 provides for a deduction of ¼ cent per pound of butterfat from the price paid to the producer, this sum to be paid to Los Angeles Milk Industry Board; Subdivision 5 of the same article requires a deduction from the price paid to the producer of milk (1) for deliveries in excess of the part classified as "base milk" a sum equal to the difference between the base price and the surplus price, and (2) for that part not in excess of the producers' bases the difference between the base price and the adjusted base price. Said sums to be paid to Milk Producers, Inc., for the purpose of equitably allocating the loss involved in handling surplus milk." And by Subdivision C of the same paragraph, every distributor having production of his own is required to make similar payments.

In making these provisions the Secretary assumes to legislate. He assumes to legislate not only without any attempt by Congress to delegate that power of legislation, but contrary to the provisions of the Act. He attempts to impose upon the producer the burden of the loss from handling surplus production. *At no place does the Act indicate an intention of Congress to impose such a burden upon the producers.* On the contrary, paragraph 1 of Section 8 provides for the reduction in production by rental or benefit payments "to be paid out of any monies available for such payments." This clearly indicates that where such payments are made they are to be made by the Government. Section 9 of the Act provides for processing taxes and that they "shall be paid by the processor." The attempt of the Secretary to pass this burden on to the producer is a void effort to legislate without any authority.

(7) Sublivision C of paragraph 4 of Article III of License No. 17 provides, that all producers who are not members of seven cooperative organizations named therein shall pay to the Milk Producers, Inc., an amount for each pound of butterfat equal to the average amount which the member of such associations are then authorizing the distributors to pay over to such associations on behalf of their respective members. This also is legislation by the Secretary and without any authority in the Act.

(8) Paragraphs 4 and 5, of Article III of License No. 17 provides as to each subdivision thereof, that distributors shall not purchase milk from producers unless such producers authorized the distributor to deduct from

the payment due to the producer and pay over as therein provided the amounts therein called for. *In other words, the Secretary of Agriculture enacted a law which deprives the producer of the right to sell his product unless he authorized a deduction from the purchase price of various sums determined according to a law enacted by the Secretary of Agriculture.* Upon no theory can it be said that such requirements are not attempts at legislation.

These things stand out particularly as showing the extent to which the Secretary of Agriculture has gone in his assumption to exercise legislative authority. Every part of each of the licenses is subject to this objection. No provision contained in either license can be justified as an administrative regulation under proper authority of law.

Paragraph (3), of Section 8, of the Act Is Unconstitutional Because It Confers Judicial Power Upon the Secretary of Agriculture.

After authorizing the Secretary to issue licenses, Paragraph 3 of Section 8, reads:

> "The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law. Any such person engaged in such handling without a license as required by the Secretary under this Section shall be subject to a fine of not more than $1,000 for each day during which the violation continues."

Milk Regulations, Series 1, published by the Secretary July 22, 1933, in Section 203, (lines 26 to 31, page 7, of Complaint) provide:

> "Any license issued hereunder may be suspended or revoked with respect to any distributor for violation of the terms or conditions thereof by such distributor or by any of his officers, employees, or agents. The procedure for suspension or revocation proceedings shall be in accordance with General Regulations, Agricultural Adjustment Administration, Series 3."

Article II, of General Regulations, Series 3, containing these provisions, is set out in the Bill of Complaint at pages 9, 10, 11 and 12. Thus it will be seen that the law authorizes the Secretary to suspend or revoke any license, after due notice and opportunity for hearing, and makes the penalty applicable to any one who continues in business after such revocation. The determination of one's right to do business and making him liable to severe penalty, is a judicial act.

Section 1, Article III, of the *Federal Constitution* provides:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior."

Neither the Secretary of Agriculture nor the hearing officer appointed by him, is a judge holding office during good behavior, nor does either constitute a court

ordained or established by Congress. They are executive officers of the Government and it is contrary to the whole scheme of the Constitution that such judicial authority should be vested in them.

The language of the Supreme Court in *Ex Parte Milligan,* 4 Wall. 2, 18 Law Ed. 281, is particularly applicable here. It is there said:

> "Every trial involves the exercise of judicial power; and from what source did the Military Commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vested it 'in one Supreme Court and such inferior courts, as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.'"
>
> "But it is said that the jurisdiction is complete under the 'laws and usages of war'."
>
> "It can serve no useful purpose to inquire what those laws and usages are, when they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usages of

> war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our National Legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior."

In the present case we have this situation: It is claimed that the license has the force of law. All of the terms and conditions therein set out are prescribed by the Secretary. Not a single one of them is even suggested in the Act. If these terms and conditions have the force of law, that law was made by the Secretary of Agriculture.

Appellees were charged only with violating the law thus made by the Secretary and were placed on trial to determine their right to continue in business—the most valuable property right they possess—on a charge made by the Secretary and which starts out with the statement that the Secretary has reason to believe that they are guilty. (Exhibits 3, 5, 6, 8, 9, 11, 12 and 14, Bill of Complaints.)

Appellees were placed on trial before a hearing officer who is an officer or employee of the Department of the Secretary of Agriculture, designated by the Secretary for that purpose. The Secretary appears as a party to the proceeding and as the prosecutor, and as such is represented by his counsel.

Thus it is apparent that the Secretary of Agriculture makes the law; the Secretary of Agriculture is the complaining witness who makes the charge of violation of the law; the Secretary of Agriculture is the tribunal who proposes to try the issues of guilt or innocence and to interpret the law he has made, and the Secretary of Agriculture is the prosecutor who prosecutes the case before himself. Yet it will doubtless be argued in this case that such a travesty on justice is permitted by the Constitution of the United States. If such procedure is permitted by the Constitution, why did the framers of the Constitution provide for a Congress to make the laws? If such procedure is permitted by the Constitution, why did the framers of the Constitution provide for Courts to be established to exercise the judicial powers of the Government? Wherein is such procedure consistent with liberty? Wherein does such procedure differ from tyranny? Will anyone contend that these plaintiffs can have a fair trial before such a tribunal?

The despotic situation just outlined is due to the fact that paragraph (3), of Section 8, of the Act, attempts to confer upon the Secretary of Agriculture both legislative and judicial powers, contrary to the provisions of the Constitution.

The License Constitutes an Unlawful Interference With the Right of Plaintiffs to Contract.

The License No. 17 provides that Exhibit "A" shall govern the prices at which, and the terms and conditions under which, milk shall be purchased by distributors. Exhibit "A" contains many specifications of prices and

terms and conditions governing the purchase of milk by distributors.

Subdivision (b) of paragraph 4, Article III, provides that distributors shall not purchase milk from any producer unless the producer authorizes the purchasing distributor to pay up to ¼ cent a pound butter fat to the Los Angeles Milk Industry Board; Subdivision (c) prohibits distributors from purchasing milk from any producer who does not agree that there may be deducted from his price and paid to the Los Angeles Board a sum to offset dues paid by the cooperative organizations; Subdivision (a) of paragraph 5 prohibits the purchase of milk from any producer who does not agree to the surplus deductions, and exhibit "B" prohibits sales unless made at the prices and on the terms and conditions therein stated.

License No. 57 prohibits the distributor from purchasing milk from a producer, unless the producer authorizes all deductions and regulations provided in Exhibit A; it fixes prices to be paid for milk and minimum selling prices.

Thus, it is apparent, that the freedom of any distributor to contract for the purchase of milk from a producer or to contract for the sale of the product to others is so limited that the right of contract is entirely destroyed.

Tyson & Bro. vs. Banton, 273 U. S. 429; 71 Law Ed. 718:

> "The right of the owner to fix the price at which his property shall be sold or used is an inherent

attribute of the property itself, and as such within the protection of the due processes of law clauses of the 5th and 14th amendments."

Fairmount Creamery Co. vs. Minnesota, 274 U. S. 1; 71 Law Ed. 893:

"As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequence. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions. * * *

"In Adams v. Tanner, 244 U. S. 590, 594, 61 L. ed. 1336, 1342, L.R.A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973, this court said: 'Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the funda-

mental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.'

"Concerning a price-fixing statute, Tyson & Bro. v. Banton, 273 U. S. 418, ante, 718, -A.L.R.-, 47 Sup. Ct. Rep. 426 (Feb. 28, 1927), recently declared: It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with; Com. v. O'Brien, 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught."

Frost vs. Railroad Commission, 271 U. S. 583; 70 Law Ed. 1101:

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

The effect of the licenses is to compel the producer and the distributor to surrender their constitutional right to contract as the condition upon which they may do business. License No. 57 goes even further, and abrogates contracts previously made—Article II, paragraphs 1 and 2). This violates the 5th Amendment to the Constitution.

The License Imposes Charges Upon the Individual, Producer and Distributor Without Authority and For the Benefit of Private Persons.

License No. 17, commencing with paragraph 4b, and extending to and including paragraph 5c, of Article III, imposes charges upon producers and distributors. Some of these charges are to be paid to Los Angeles Milk Industry Board and the balance to Milk Producers, Inc., the private corporation then operating a surplus plant. None of these charges are collected by the Government or paid into the Treasury. The money so raised is to be used to pay the expenses of the bodies named, and to equalize the dues of cooperative organizations, and to supply working capital for Milk Producers, Inc., and to pay equalization benefits to such producers as have no market for their milk, except as surplus.

Under License No. 57, similar charges are made and distributed through the operation of the adjustment account mantained by the Market Administrator, as provided in Exhibit A.

Manifestly these charges are for purely private purposes—not for public objects. For this reason the provisions of the licenses just referred to are void. The charges of violation of the licenses contained in the Order to Show Cause issued by the Secretary of Agriculture against each of the Appellees all relate to alleged violations of the provisions levying these charges.

In *Cole vs. LaGrange*, 113 U. S. 1, 28 Law Ed. 896, the court says:

> "The general grant of legislative power in the constitution of the State does not enable the legislature,

> in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities, or towns to contract for private objects, debts which must be paid by taxes. It can not, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

In *City of Los Angeles vs. Lewis,* 173 Cal 777, it is said:

> "The first and fundamental proposition urged upon appeal is that the legislative act is itself unconstitutional, in that it clearly and designedly authorizes taxation for a private purpose, whereas under our system of government taxes can be laid only for a public object—one within the purposes for which governments are established. Indisputably, if the legislature has authorized the doing of this thing, its authorization, under all of the authorities, is void."

A large number of authorities are there cited and the court hold unconstitutional Section 4041 of Political Code authorizing Board of Supervisors to purchase and operate cement manufacturing plants and sell the products of the same.

In *The Citizens Savings & Loan Assn. vs. Topeka City,* 20 Wall, 655, 22 L. Ed. 455, at page 461, it is said:

"The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch v. Md., 4 Wheat., 431, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent, imposed by the United States on the circulation of all other banks than the National Banks, drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay, with one hand, the power of the government of the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

"Nor is it taxation. 'A tax,' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or State.' 'Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes.' Cooley, Const. Lim. 479.

"Coulter, J., in Northern Liberties v. St. John's Church, 13 Pa. St. 104, says, very forcibly, 'I think the common mind has every where taken in the

understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose.' See, also Pray v. Northern Liberties, 31 Pa. St. 69; Matter of Mayor of N. Y. 11 Johns, 77; Camden v. Allen, 2 Dutch., 398; Sharpless v. Mayor, supra; Hanson v. Vernon, 27 Ia., 47; Whiting v. Fond DuLac, Supra.

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose.

"But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving of the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. Cited favorably in Green vs. Frazier, 253 U. S. 233, 54 L. Ed. 878, 40 Sup. Ct. Rep. 499."

By the licenses, charges are levied against some individuals for the benefit of other individuals. *The authority to make the levy comes not from Congress, but from a law enacted by an executive officer.* The amount

of *the charge* for surplus *is* first *determined by the private corporation which collects it.* No part of the money ever passes through the government treasury.

The License Is An Attempt, by Federal Authorities, to Fix Commodity Prices to Producers, Distributors, and Consumers in the Course of Conducting a Business Which Is Not Burdened With a Public Interest or Duty and Which Is Not Subject to Price Regulation by Federal Authorities or Otherwise and Deprives Plaintiffs of Property Without Due Process of Law in Violation of the Fifth Amendment of the Constitution.

License No. 17 provided that the schedule of wholesale resale and retail prices at which fluid milk shall be distributed and sold by the distributors in the various parts of the Los Angeles sales area shall be those set forth in Exhibit B. Exhibit B sets out thirteen price schedules effective in different parts of the Los Angeles sales area. Exhibit A prescribes the prices to be paid to producers. By these price schedules the Secretary of Agriculture undertakes to fix all of the prices to govern the milk industry within a limited territory within the State of California.

There is not constitutional authority for the Federal government to fix prices either locally or generally. The power of a State in that regard is much greater than the power of the Federal government. The State is invested with police power which, under certain circumstances of emergency, has been held to extend to some

regulation of price. The Federal government has no such police power.

The act of Congress authorizing the Secretary to issue licenses permitting persons to engage in the handling, in the current of interstate or foreign commerce, of agricultural commodities upon such terms and conditions as may be necessary to eliminate unfair practices, etc., cannot be construed to grant authority to do things or exercise powers which are denied to the Federal government by the Constitution.

New State Ice Co. v. Liebmann, 285 U. S. 273, 76 Law Ed. 747, p. 751:

> "It must be conceded that all businesses are subject to some measure of public regulation. And that the business of manufacturing, selling or distributing ice, like that of the grocer, the dairyman, the butcher or the baker may be subjected to appropriate regulations in the interest of the public health cannot be doubted; * * *
>
> "Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or

clothing or the shelter of a home. And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use; and that the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over grave emergencies. * * *

"Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed. And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of the amendment merely by calling them experimental."

Wolf Packing Co. v. Court of Industrial Relations, 262 U. S. 536, 67 Law Ed. 1102, p. 1109:

"It is manifest from an examination of the cases cited under the third head that the mere delcaration

by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

"In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices, or strikes in many trades, but the expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois and other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public. * * *

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law and omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one

makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

Tyson & Bro. v. Banton, 273 U. S. 429, 71 Law Ed. 718, p. 722:

"Strictly, the question for determination relates only to the maximum price for which an entrance ticket to a theatre, etc., may be resold. But the answer necessarily must be to a question of greater breadth. The statutory declaration (Sec. 167) is that the price of or charge for admission to a theatre, place of amusement or entertainment or other place where public exhibitions, games, contests or performances are held, is a matter affected with a public interest. To affirm the validity of Sec. 172 is to affirm this declaration completely since appellant's business embraces the resale of entrance tickets to all forms of entertainment therein enumerated.

"In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, State Freight Tax Case, 15 Wall. 232, 278, 21 L. ed. 146, 162, and as much, within the protection of the due process of law clauses of the 5th and 14th Amendments. See Carrolton v. Bazzette, 159 Ill. 284, 294, 31 L. R. A. 522, 42 N. E. 837. The power to regulate property, services or business can be invoked only under special circumstances; and it does not follow that because of power may exist to regulate in some particulars it exists to regulate in others or in all.

"The authority to regulate the conduct of a business or to require a license comes from a branch of the police power and which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business (Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 246, 46 L. ed. 1144, 1147, 22 Sup. Ct. Rep. 881) but exists only where the business of the property involved has become 'affected with a public interest.' * * * Certain properties and kinds of business it obviously includes, like common carriers, telegraph and telephone companies, ferries, wharfage, etc. Beyond these, its applications not only has not been uniform, but many of the decisions disclose the members of the same court in radical disagreement. Its full meaning like that of many other generalizations, cannot be exactly defined;—it can only be approximated.

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business."

Ribnik v. McBride, 277 U. S. 357, 72 Law Ed. 913, p. 916:

"An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of

public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern.

"The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control. Chas. Wolff Packing Co. v. Court of Industrial Relations, supra, p. 536 (67 L. ed. 1108). Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, Tyson & Bros.—United Theatre Ticket Offices v. Banton, supra, pp. 431, 437 (71 L. ed. 723, 725), the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place."

The Secretary Is Not An Indispensable Party

In this case the records show clearly that the Secretary of Agriculture has done all that he can do as against plaintiffs and appellees. He has issued his orders to show cause; the trial has been had and he has as to each of the plaintiffs made an order finding them guilty of violations and revoking their licenses. Still the defendants in this action continue to make their demands upon the plaintiffs. The Los Angeles Milk Industry Board con-

tinues to demand that the money claimed by it to have accrued under the license be paid to it (R. 65 to 80); Milk Producers, Inc., continues to demand the monies it claims under the licenses, has brought suit against one of the plaintiffs to recover and does not deny that it intends to bring suit against others (R. 80 and 103); defendant Larsen continues to make demands and claims the right to enforce the orders of the Secretary purporting to forfeit the licenses (R. 59); defendant Darger continues to assume and claims the right to enforce the provisions of License No. 57 (R. 59), and it is not denied that the defendant Hall intends to and will institute proceedings to enforce the orders of the Secretary of Agriculture and to enforce the penalties prescribed by the act (R. 110). It is the acts of these defendants, purporting to act under authority of the licenses which plaintiffs contend are void and therefore no justification for their acts, that plaintiffs seek to enjoin. The Secretary of Agriculture has nothing more to do with the matter.

It has been argued that an application under Section 218 of the Regulations might be made to the Secretary for reinstatement under the license (R. 268). Such an application has not been made and obviously would not be made *when the contention of the plaintiffs is that the license is void in its entirety.* The very provisions of the sections of the Regulations referred to preclude such an application, because in no instance can reinstatement be made under this action except upon a showing, satisfactory to the Secretary, that "the applicant is able and willing in good faith to comply with the terms and conditions of the license." The very basis of this litigation is

that plaintiffs are not able or willing to comply with these licenses.

In *Warner Valley Stock Company vs. Smith,* 165 U. S. 28, 41 Law Ed. 621, decided in 1897, the court held that the action could not be maintained against the Commissioner of the General Land Office, after it had abated as to the Secretary because of his resignation.

In *Gnerich v. Rutter,* 265 U. S. 388, 68 Law Ed. 1068, decided in 1924, it was held that the Commissioner of Internal Revenue was a necessary party to a proceeding to enjoin the enforcement of a restriction in a permit to sell intoxicating liquor and that the suit could not be maintained against the Prohibition Director for California alone.

In *Webster v. Fall,* 266 U. S. 507, 69 Law Ed. 411, decided in 1925, it was held that the Secretary of the Interior was a necessary party to a bill by an Osage Indian to compel payment of monies alleged to be due under an Act of Congress.

Those are the three Supreme Court cases cited by appellants, upon which they contend that the Secretary of Agriculture is an indispensable party in this action.

On the other hand, in the case of *American School of Magnetic Healing vs. McAnnulty,* 187 U. S. 94, 47 Law Ed. 90, decided in 1902, it was held that a suit for injunction could be maintained against the local postmaster without joining the Postmaster General where the Postmaster General had ordered mail withheld from the plaintiff.

In *Missouri v. Holland,* 252 U. S. 416, 64 Law Ed. 641, decided in 1920, the court held the jurisdiction

proper in the suit which had been brought against the Game Warden, without joining the Secretary of Agriculture, to enjoin the enforcement of the Migatory Bird Treaty Act and the regulations made by the Secretary of Agriculture under the same.

In *Colorado vs. Toll,* 268 U. S. 228, 69 Law Ed. 927, decided in 1925, later than any of the cases above mentioned, the court reversed an order dismissing a bill for injunction against the Superintendent of a National Park, without joining his superior.

At first and without further examination it may seem that the Supreme Court has announced two inconsistent lines of ruling.

Passing to the decisions of the Circuit Court of Appeal we find, that in the case of *Appalachian Electric Power Co. v. Smith,* 67 Fed. (2d) 451, the Court in the Fourth Circuit reversed a dismissal on the merits and ordered a dismissal for want of jurisdiction.

And in *Moore v. Anderson,* 68 Fed. (2d) 191, the Ninth Circuit held the Secretary of the Interior an indispensable party in an action to enjoin his subordinates and agents from refusing to deliver water under an irrigation project.

On the other hand in *St. Louis Independent Packing Co. vs. Houston,* 215 Fed. 553, it was held (we quote the syllabus):

> "A Federal Court has jurisdiction to determine a suit by a packer or manufacturer of meat food products to require the inspectors of a Department of Agriculture to inspect and pass a meat product under

> the provisions of the Meat Inspection Act, where the chief inspector in charge at the place of suit is before the court, although the Secretary of Agriculture and Chief of Animal Industry, who are also made parties defendant, cannot be served by reason of their non-residence."

In *Broughan v. Blanton Manufacturing Co.,* 243 Fed. 503, the Circuit Court of Appeals of the Eighth Circuit said:

> "It is first contended by the appellants that no injunction could rightfully have been granted against the appellants, because such an injunction could not have been properly granted against the Secretary of Agriculture. In St. Louis Independent Packing Co. v. Houston, 242 Fed. 337, we recently had occasion to fully examine this question, and following that case, we hold that this injunction could properly have issued against the Secretary of Agriculture had he been served or appeared, but having his subordinates there, which, it was alleged, were violating the law or about to violate it, upon a proper showing an injunction could issue against them."

In the recent case of *Ryan v. Amazon Petroleum Corporation,* decided May 22, 1934, by the U. S. Circuit Court of Appeals of the Fifth Circuit, the Court says:

> "The Secretary of the Interior is not personally doing or threatening the acts of trespass and of prosecution which are sought to be enjoined, although the actors may be authorized and incited by him, so that he would be a proper co-defendant if he were within the court's reach. The court has power to stop the trespassing by those within its jurisdiction irrespective of their claim that they are

acting for others. Osborne v. Bank of United States. 9 Wheat, 738; State of Colorado v. Toll, Supt. 268 U. S. 228. This is not a bill to cancel the Secretary's Regulations, but only to test their efficacy to protect defendants in their alleged trespass against complainants' rights. There is no more need to make the Secretary a party for this purpose than to make the President a party because he promulgated the Code, or the Congress because it enacted the statute."

I. S. Yarnell, et al. v. Hillsborough Packing Company, et al. (United States Circuit Court of Appeals for the Fifth Circuit, No. 7309, April 14, 1934):

"Appeal from the District Court of the United States for the Southern District of Florida.

"Before Bryan, Sibley and Hutcheson, Circuit Judges—Bryan, Circuit Judge:

"Appellants are here complaining of an interlocutory injunction issued against them at the instance of appellees, and of the denial of their motion to dismiss the bill of complaint. * * *

"But if those regulations are indeed invalid, the Control Committee cannot shield themselves behind the Secretary, or compel compliance therewith in his name. Colorado V. Toll, 268 U. S. 228. It follows that the Secretary was not an indispensable party. As the Control Committee did not admit the illegality of the orders they revoked on the eve of the hearing, nor disclaim any intention to issue similar orders in the immediate future, the case is not moot. United States v. Freight Association, 166 U. S. 290, 308; Sou. Pac. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498. Appellees attack the Control Committee's orders as being null and void,

> and so they had the right to apply to the court for relief in the first instance. Euclid v. Ambler Co., 272 U. S. 365, 386. * * *"

We are thus forced to the conclusion that, either both the Supreme Court and the Circuit Courts of Appeal have been rendering inconsistent decisions, or there is a fundamental difference between those cases where the courts have held the Secretary or the superior officer to be an indispensable party and those cases wherein the same courts have held that the action may be maintained against the subordinate without joining the Secretary or superior officer. We submit the latter is the correct solution of the apparent difficulty; that the two classes of cases involved fundamentally different causes of action; that fundamentally different questions were presented and fundamentally different rights asserted.

The difference between the two classes of cases is pointed out in the case of the *American School of Magnetic Healing vs. McAnnulty,* where the court says:

> "The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual, the courts generally have jurisdiction to grant relief."

Thus when an inferior officer is sued he must justify his acts by some law. If the law which he asserts as justification is unconstitutional or is the order of a superior which was beyond the power of the superior to issue, then, he has presented no justification for his acts and he is the only party necessary to a suit to enjoin him from doing those acts.

As was said in *Ex Parte Young,* 209 U. S. 123, 52 Law Ed. 714, at page 729:

> "The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding, without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

So, here, if the act in question and the license are void and not applicable to plaintiffs, because they are unconstitutional or because the license is beyond the power of the Secretary, then, the defendants now before the court are stripped of their official or representative character and are subjected in person to the consequences of their individual conduct; they are proceeding without the authority of their Superior.

If this principle is kept in mind while examining the decisions cited by appellants, it will clearly appear that

there is no conflict between those decisions and the ones we have cited. The cases they cite are correct on the facts of those cases, but they have no application to the matters now before this Court.

Warner Valley Stock Co. v. Smith, 165 U. S. 28, 41 Law Ed. 621, was an action for a mandatory injunction against the Secretary of Interior compelling him to issue a patent to plaintiff and to restrain the Secretary and Commissioner of the General Land Office from exercising jurisdiction with respect to disposition of certain lands. During the pendency of the appeal, Smith resigned as Secretary of the Interior. The Court held that the suit abated as to him by his resignation of the office, and said:

> "The main object of the present bill was to compel the defendant Hoke Smith, as Secretary of the Interior, to prepare patents to be issued to plaintiff for the lands in question. The mandatory injunction prayed for was in effect equivalent to a writ of mandamus to him. The reasons for holding a suit, which has this object, to have abated as to him, by his resignation are as applicable to this bill in equity as to a petition for a writ of mandamus at common law."

The court then holds that the action cannot continue against the Commissioner alone. As to this the Court says:

> "The purpose of the bill was to *control* the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was

> only incidental and was by way of restraining him from executing the orders of his official head."

There was no question as to the constitutionality of the law or the jurisdiction of the Secretary to act in the premises. The purpose of the bill was to *control* his action in a matter as to which, under a valid law, he had a right to act.

The appellees now before this Court allege in their bill that defendants are attempting to justify their illegal acts under an unconstitutional law and a license which is void and beyond the power of the Secretary to impose. We do not seek to control the action of the Secretary, but we do seek to prevent the illegal acts of these particular individuals.

In Webster v. Fall, 266 U. S. 507, 69 Law Ed. 511, it was held that the Secretary of Interior was a necessary party to a bill by an Osage Indian for a mandatory injunction to compel payment to complainant of monies alleged to be due under an Act of Congress. The Court there stated, regarding the position of the Secretary of the Interior, as follows:

> "The statutory direction to cause quarterly payment to be made is addressed to the Secretary. The power and responsibility are his. Neither Wright nor Wise have any primary authority in the matter, they act only under, and in virtue of, the Secretary's general or special direction. In the absence of which, no payment or disbursement properly can be made. Authority in the superintendent to supervise such payments is not authority to cause them to be made."

Here, again, there was no constitutional question involved nor did the action challenge the jurisdiction. It also asked for a mandatory injunction.

In *Gnerich v. Rutter,* 265 U. S. 388, 68 Law Ed. 388, the Court held that the Commissioner of Internal Revenue was a necessary party to that action, which was brought for an injunction against the Federal Prohibition Director of California. No constitutional question was involved in that case and the decision is limited by the peculiar wording of the National Prohibition Act. It was conceded that the matter was lawfully within the jurisdiction of the Secretary.

In the case of *Appalachian Power Co. v. Smith,* 67 Fed. (2d) 451, the Court used language which shows that the ruling was not based upon any question here involved.

That action had been brought against the members of the Federal Power Commission as individuals and not as commissioners. The Court held that the order complained of had been made prior to the commencement of the action and that under the law the enforcement of the order was entirely in the hands of the attorney general, and said:

> "It is well settled, of course, that equity will, in the proper case restrain officials of the government of acts constituting an invasion of individual rights, where such acts are not authorized by statute or where the statute authorizing them is void because in conflict with some provision of the constitution. But here the defendants are not threatening any action which will prevent the plaintiffs from pro-

> ceeding with the construction of its project. The findings and orders of which complaint is made had already been entered when suit was instituted; and defendants had no further duties with respect to preventing the erection of the project."

The case of *Moore v. Anderson,* 68 Fed. (2d) 191, cited by defendants, involved water rights and was to enjoin agents or subordinates to the Secretary of the Interior from refusing to deliver the quantity of water to which plaintiffs claimed they were entitled by virtue of contracts made by plaintiffs with the Secretary of Interior.

In that case the Circuit Court of Appeals said:

> "In other words, without making the Secretary a party to the suit, appellees are in fact asking this court to construe and interpret a contract entered into between themselves and the Secretary of the Interior on behalf of the United States."

The Court then refers to the case of *Colorado v. Toll,* 268 U. S. 228, as follows:

> "In the Toll case, supra, the Supreme Court held that, under the facts, the Secretary was not an indispensable party. In our opinion, however, the Toll Case is not authority for dispensing with the Secretary in the instant suit. In the Toll Case, the bill alleged that the regulations that the superintendent of the park was seeking to enforce were beyond the authority conferred by act of Congress *and* interfered with the sovereign rights of the state As stated in the opinion, at page 230 of 268 U. S., 45 S. Ct. 505, 506, 69 Law Ed. 927: 'The object of

> the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States. (Cases cited.)'
>
> "In thus stating the rule, the Supreme Court used the word 'authority' as it had been used in the beginning of the opinion; that is, 'beyond the authority conferred by the acts of Congress.' Here the suit is against individuals who are attempting to carry out instructions of the Secretary made in pursuance to the contract referred to above."

Thus it is clear that not a single one of the cases cited by appellants was decided upon the issue of a challenge to the constitutionality of the law or a challenge of the authority of the superior officer to act.

Let us now consider the cases cited by us to support our claim that the Secretary is not an indispensable party to this suit.

In *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 Law Ed. 90, the Postmaster General had issued an order excluding the complainant from the United States mails and directing the postmaster at Nevada, Missouri, not to deliver mail to it. This suit for injunction was brought against the local postmaster only. The lower court dismissed the bill, the Supreme Court reversed this. It held that the facts stated in the bill and admitted by the demurrer show that the business

of complainant was not prohibited by the Act of Congress. In the opinion it is said:

> "That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by an action by the head, or one of the subordinate officials, of that Department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. * * *
>
> "Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. * * *
>
> "The facts, which are here admitted of record, show that the case is not one which, by any construction of those facts, is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the

action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld.

"In our view of these statutes the complainants had the legal right, under the general acts of Congress relating to the mails, to have their letters delivered to the postoffice as directed. They had violated no law which Congress had passed, and their letters contained checks, drafts, money orders, and money itself, all of which were their property as soon as they were deposited in the various postoffices for transmission by mail. They allege, and it is not difficult to see that the allegation is true, that, if such action be persisted in, these complainants will be entirely cut off from all mail facilities, and their business will necessarily be greatly injured, if not wholly destroyed, such business being, as far as the laws of Congress are concerned, legitimate and lawful. In other words, irreparable injury will be done to these complainants by the mistaken act of the Postmaster General in directing the defendant to retain the refuse to deliver letters addressed to them. The Postmaster General's order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. In such a case as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled."

So, here we say that the license, being the result of a mistaken view of the law, cannot operate as a defense

to this action on the part of the appellants now before the Court nor justify any act on their part.

The case of *Missouri v. Holland,* 252 U. S. 416, 64 Law Ed. 641, was a bill in equity brought against a game warden of the United States to prevent him from attempting to enforce a Migratory Bird Treaty Act and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill was that the statute was an unconstitutional interference with the rights reserved to the states by the Tenth Amendment and that the acts of the defendant done and threatened under that authority invaded the sovereign right of the state and contravened its will manifested in statutes.

The case of *Colorado v. Toll,* 268 U. S. 228, 69 Law Ed. 927, was an action to enjoin the Superintendent of the Rocky Mountain National Park from enforcing certain regulations for the government of the park, which were alleged to be beyond the authority conferred by the Acts of Congress. The bill was dismissed for want of equity by the District Court. The Court says:

> "The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi-sovereign authority of the State. There is no question that the bill in equity is a proper remedy; and that it may be pursued against the defendant without joining either his superior officers or the United States. Missouri v. Holland, 252 U. S. 416, 431, 64 Law Ed. 641; Philadelphia Co. vs. Stimson, 223 U. S. 605, 56 Law Ed. 570. As the bill was dismissed upon the merits it is not necessary to say more upon this preliminary question."

The decree was reversed, the Court saying near the end of the opinion:

> "In its (plaintiff's) argument it maintains that the acts relied upon by the Superintendent do not have the scope attributed to them, and asserts that if they had purported to go so far, they would have been without authority. The state is entitled to try the question, and to require the alleged grant to be proved."

We again call attention to the several Circuit Court of Appeals cases previously cited herein.

In this action plaintiffs allege that the defendants named herein are doing acts which themselves result in irreparable injury to plaintiffs and which they seek to justify by virtue of the license issued by the Secretary of Agriculture. Plaintiffs allege that this license is, in its entirety, absolutely null and void as to the plaintiffs and that the Federal Government, or any of its agents, has no jurisdiction whatever over plaintiffs or their businesses. If this is true, then the license is a result of the mistaken view of the law and it cannot operate as a defense to this action. Plaintiffs are, therefore, entitled to the relief they now ask against the parties who are doing the acts that injure them. Furthermore, these defendants are not in the position of mere subordinates, carrying out orders as given them from time to time by the Secretary of Agriculture. They are in the position of doing acts which injure the plaintiffs and seeking to justify those acts by a void law. Take for instance the defendant Darger. He claims to act as Market Administrator appointed by the Secretary of Agriculture pur-

suant to the provisions of the license. The mere fact that he is appointed by the Secretary of Agriculture does not make it necessary to bring in the Secretary of Agriculture in order to enjoin illegal acts on his part, any more than it would be necessary to bring in the President in case the suit were to enjoin the acts of the Secretary of Agriculture. The President appoints the Secretary of Agriculture, but when he has been appointed and is acting pursuant to what he claims to be a law applicable to him, it is not necessary to join the President in order to maintain an action to challenge his authority to do the acts. According to the license, the Market Administrator shall perform such duties as are provided for him in the license. When he does the things mentioned in the license his acts are final and conclusive and not subject to review or approval by the Secretary of Agriculture. He is, therefore, assuming to act as an officer administering the provisions of the license.

The law gives to the Secretary the right to issue licenses in certain instances. The Secretary assumed that this was one of the instances in which he was authorized to issue a license. When he issued that license and prescribed the terms and conditions upon which the business of distributing milk could be conducted in Los Angeles, he had completed all that there was for him to do. If the license is valid, the Market Administrator has the authority to do the things therein specified for him to do; but if the license is not valid, then the Market Administrator has no authority whatever. The license is not a mere administrative regulation for the guidance of the deputies of the Secretary of Agriculture. It un-

dertakes to prescribe the law governing the conduct of business and the Market Administrator is undertaking to enforce that law. He is in no different position than any other officer assuming to act under a law. If the law is valid he may act, but if the law is invalid he is simply a usurper and has nothing whatever to justify his act; when he is called to account for his acts, he cannot say that someone else made the law; but, he must show that there is a valid law authorizing his acts.

Plaintiffs are entitled to the relief they ask against the defendants now in court. The Secretary of Agriculture would be a proper party were he within the jurisdiction of the Court, but he is in no sense an indispensable party. To say that the Secretary of Agriculture can, by remaining out of the jurisdiction of the Court, prevent any relief to citizens of California against acts of usurpation on the part of those appointed by him, is equivalent to saying that the Courts are helpless to protect a citizen in his rights when those rights are invaded by persons who are before the Court.

The Bill of Complaint Is Sufficient.

It is contended by appellants that the complaint fails to show that plaintiffs have exhausted their remedies provided by the act. We have just shown that plaintiffs have exhausted all of their remedies insofar as the points involved in this action are concerned; that is, the question as to the validity of the law and validity of the license and the validity of the proceedings the defendants are conducting. All of these have been finally determined against us by the administrative authority.

But it is not necessary for a plaintiff to exhaust administrative remedies before suing in equity where the action is based upon constitutional questions or the validity of the authority under which the officer is proceeding.

It is said in *Euclid v. Amber Realty Co.,* 272 U. S. 365, 71 Law Ed. 303:

> "A motion was made in the court below to dismiss the bill on the ground that, because complainant (appellee) had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitute a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear."

So here, this attack is directed, not against any specific provision or provisions of the license, but against the license as an entirety. The very existence and efforts to maintain the license, if it is void, constitutes a present invasion of plaintiff's property rights and a threat to continue and enlarge that invasion.

In *Pierce v. Society of Sisters,* 268 U. S. 510, 69 Law Ed. 1070, the action was brought to enjoin the enforcement of a statute which was not to become effective for

about two years. The law involved was a law of Oregon requiring that all children attend public schools. The case was decided in the Supreme Court about a year prior to the effective date of the law and the court said:

> "But the injunctions here sought are not against the exercise of any *proper* power. Appellees ask protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent destruction of their business and property. Their interest is clear and immediate. * * *
>
> "The suits are not premature. The injury to appellees was present and very real—not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of a court of equity."

So, in this case, the plaintiffs are seeking to prevent an irreparable injury by asking protection against arbitrary, unreasonable and unlawful interference with their businesses, and they are not required to wait until their businesses have been destroyed before asking a court of equity to intervene.

In *Work v. Louisiana,* 269 U. S. 250, 70 Law Ed. 259, it is said:

> "It is urged that the trial court was without jurisdiction to entertain the bill, upon the grounds that it was prematurely brought, before the Secretary had exercised his jurisdiction to determine the character of the lands and while the claim was still in the process

> of administration. * * * These objections are based upon a misconception of the purpose of the suit. * * * The bill does not seek an adjudication that the lands were swamp and overflowed lands or to restrain the Secretary from hearing and determining this question, but merely seeks an adjudication of the right of the state to have this question determined without reference to their mineral character, and to require the Secretary to set aside the order requiring it to establish their non-mineral character or suffer the rejection of its claim. In short, it is merely a suit to restrain the Secretary from rejecting its claim, independently of the merits otherwise, upon an unauthorized ruling of law illegally requiring it, as a condition precedent, to show that the lands are not mineral in character.
>
> "It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect."

Most of the other assignments of error are embraced within the consideration of the questions of irreparable injury and adequate remedy at law. It will be noted that many of the cases cited by defendants were decided on the proposition that injunction will not lie to control an executive officer in exercising a matter of discretion lawfully committed to him. But such officer has no discretion to do an act without authority. It is also claimed that the officers might be liable in damage. The license says that the Market Administrator shall not be liable to anyone in damages for any act done pursuant to the purported license.

In considering all of these questions it is necessary to keep in mind the nature of this action—that it completely challenges the authority of each of the defendants to do any of the acts of which plaintiffs complain. These plaintiffs come into court, representing that they are citizens of Southern California; that over a period of time, each of them has built up a purely local business in which he has invested his capital and from which he derives a livelihood for himself and his family; that his business is lawful and conducted in a lawful manner; that each of the defendants, pretending to be an officer of the Federal Government, is now interferring with the conduct of that business and doing acts which will destroy the value of the property invested in that business and the good will which they have created for that business; that these defendants seek to justify their acts by the provisions of a purported license issued by the Secretary of Agriculture; plaintiffs show to the court that said purported license is void in its entirety and that the law under which it purports to have been issued is unconstitutional as applied to the businesses of plaintiffs, and also that they are intimidated from standing on what they believe to be their rights and suffering prosecution under the Act, because of the excessive penalties to which they will be subjected in the event the courts should determine that their position is wrong. On these facts they ask the Court to now determine the validity of the license under which defendants claim to act, and if the Court sustains their position, to enjoin the defendants from doing these acts.

The Complaint challenges the constitutionality of the Act as applied in issuing the licenses; it challenges the con-

stitutionality and the validity of both licenses; it challenges the validity of all acts done pursuant to the licenses; it challenges the authority of the defendants named to do the acts which it states they are doing and threatening to do; it shows that valuable property rights of plaintiffs are being invaded and threatened and that the damage would be irreparable, and it shows that plaintiffs are threatened with a multiplicity of civil and criminal proceedings to enforce the void licenses and may be subjected to very excessive penalties. These facts justify relief by injunction.

In *Board of Liquidation v. McComb,* 92 U. S. 531, 23 Law Ed. 623, the United States Supreme Court says:

> "It has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury, thereby, for which adequate compensation cannot be had at law, may have, an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void. Osborn v. Bank of U. S., 9 Wheat. 859; Davis v. Gary, 16 Wall. 220."

A law of the State of New York required all operators of taxicabs to carry insurance.

Packard v. Banton, 264 U. S. 140, 68 Law Ed. 596, was an action in equity in the Federal Court to enjoin the enforcement of this law. The Court upheld the law, but sustained the right to bring the action, saying:

> "Appellees insist that the district court was without jurisdiction because the matter in controversy does not exceed the value of $3,000. Judicial Code Paragraph 24, subd. 1. The bill discloses that the enforcement of the statute, sought to be enjoined, will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced if the law be enforced, to the extent of $18.50 each per week; and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. * * *
>
> "Another preliminary contention is that the bill cannot be sustained because there is a plain, adequate and complete remedy at law; that is, that the question may be tried and determined as fully in a criminal prosecution under the statute as in a suit in equity. The general rule undoubtedly is that a court of equity is without jurisdiction to restrain criminal proceedings unless they are instituted by a party to a suit already pending before it, to try the same right that is in issue there. Re Sawyer, 124 U. S. 200, 209-211, 31 L. ed. 402, 405, 406, 8 Sup. Ct. Rep. 486; Davis and F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 217, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498.

"But it is settled that a 'distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property.' Truax v. Raich, 239 U. S. 33, 37, 38, 60 L. ed. 131, 133, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. The question has so recently been considered that we need do no more than cite Terrace v. Thompson, 263 U. S. 197, ante, 255, 44 Sup. Ct. Rep. 155, decided November 12, 1923, where the cases are collected, and state our conclusion that the present suit falls within the exception, and not the general rule. Ruston v. Des Moines, 176 Iowa, 455, 464, 156 N. W. 883; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18."

Terrace v. Thompson, 263 U. S. 197, 68 Law Ed. 255, was an action to enjoin the enforcement of the Alien Land Law of the State of Washington. This law prohibits aliens who have not declared their intention to become citizens from holding land, and imposes penalties of fine, imprisonment and forfeiture for violations of its provisions. The Court held the law constitutional, but upheld the right to maintain the action to adjudicate the questions involved under the Federal Constitution. The Court says:

"That a suit in equity does not lie where there is a plain, adequate, and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical, and efficient as that which equity could afford. Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever

it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such case, a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties effected, may be enjoined from such action by a Federal court of equity. * * * If, as claimed, the state act is repugnant to the due process and equal protection clauses of the 14th Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law, which is as practical, efficient or adequate as the remedy in equity. And assuming, as suggested by the attorney general, that, after the making of the lease, the validity of the law might be determined in proceedings to declare a forfeiture of the property to the state, or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment, and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join them in violating the terms of the enactment and take the risk of forfeiture. Similarly, Nakatsuka must continue to be deprived of his right to follow his occupation as

> farmer until a landowner is found who is willing to make a forbidden transfer of land and take the risk of punishment. The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the attorney general to enforce the punishments and forfeiture prescribed prevents each from dealing with the other. Truax. v. Raich, 239 U. S. 33, 37, 39, 60 L. ed. 131, 133, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. They are not obligated to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution."

In *Santa Fe Pac. R. R. Co. v. Lane,* 244 U. S. 492, 61 Law Ed. 1275, the law involved was a Land Grant Act which required the Company to advance the cost of surveying the lands. The Secretary required the deposit of the total cost of surveying the entire sections, though the portion granted was only part of many of the sections. It was decided that the law did not require the Company to pay for surveying any but the lands granted and that in making such a demand the Secretary plainly exceeded his authority.

The Court says:

> "Thus, the demand was an unauthorized act, done under color of office and the defendant properly may be enjoined from insisting upon or giving effect to

it, unless it be that there is an absence of other elements essential to granting such relief.

"We think the other elements are not wanting. There are millions of acres of unsurveyed lands within the primary limits of the unforfeited portion of the grant of 1866. See Senate Report supra. The plaintiff is entitled to many of the odd-numbered sections within the unsurveyed areas. A claim such as is evidenced by the demand made by the defendant, unless and until it is adjudged unauthorized, will cause a serious cloud upon the plaintiff's rights in the granted lands remaining unsurveyed and be a source of serious embarrassment. Besides, the Act of 1910 contemplates that when a demand thereunder is not complied with the rights of the grantee in the granted lands specified in the demand "shall cease and forfeit" to the United States, and the Secretary shall notify the Attorney General in order that the latter may begin 'proceedings to declare the forfeiture' and to restore the lands to the public domain. The plaintiff was not required, in order to test the validity of the demand, to permit the ninety days to pass and to rely entirely upon defending such suit as might be brought by the Attorney General. On the contrary, if the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity to have the defendant enjoined from insisting upon or giving any effect to it. The hazard and embarrassment incident to any other course were such as to entitle it to act promptly and affirmatively, and of course there was no remedy at law that would be as plain, adequate, and complete as a suit such as this against the defendant."

So in the present case plaintiffs are not required to wait until their licenses have been forfeited, their busi-

nesses ruined, and proceedings brought against them for the penalties. The defendants have ruled against plaintiffs on all of the points here presented. If the demands made on plaintiffs under the licenses are unlawful, as plaintiffs verily believe, they are entitled to have defendants enjoined from insisting upon or giving any effect to such licenses.

In *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 37 Law Ed. 123, the rule is thus stated:

> "We have no doubt the principal of these decisions apply to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts, that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

In *Ex Parte Young*, 209 U. S. 123, 52 Law Ed. 714, the Court reviewed the authorities at some length and concluded:

> 'The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action."

Ex Parte Young, supra, was cited as controlling authority in *Western Union Telegraph Co. v. Andrews,* 216 U. S. 165, 54 Law Ed. 430.

On the same day, the court in *Ludwig v. Western Union Telegraph Co.,* 216 U. S. 146, 54 Law Ed. 423, says:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the state are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.
>
> "This doctrine is precisely applicable to the case at bar. The statute specifically charges the prosecuting attorneys with the duty of bringing actions to recover the penalties. It is averred in the bill, and admitted by the demurrer, that they threatened and were about to commence proceedings for that purpose. The unconstitutionality of the act is averred, and relief is sought against its enforcement. As this case is ruled, upon the question of jurisdiction, by the case of Ex Parte Young, it is unnecessary to consider the question further. Upon the authority of that case the decree of the Circuit Court dismissing the bill for want of jurisdiction is reversed, and the case remanded for further proceedings."

In *Dobbins v. Los Angeles,* 195 U. S. 223, 40 Law Ed. 169, the Court says:

> "It is well settled that, where property rights will be destroyed, unlawful interference by criminal pro-

> ceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity."

Work v. Louisiana, 269 U. S. 250, 70 Law Ed. 259, was an action to enjoin the Secretary of the interior from rejecting a claim to swamp lands granted to Louisiana upon the ground it had failed to show the lands were not mineral in character. The State claimed the Act granting the lands did not require such showing. The Court says:

> "It is clear that if the order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. * * * A suit for such purposes is not one against the United States, even though it still retains the legal title to the lands, and it is not an indispensable party."

In the recent case of *Ryan v. Amazon Petroleum Corporation,* decided May 22, 1934, by the U. S. Circuit Court of Appeals of the Fifth Circuit, the Court says:

> "The Secretary of the Interior is not personally doing or threatening the acts of trespass and of prosecution which are sought to be enjoined, although the actors may be authorized and incited by him so that he would be a proper co-defendant if he were within the court's reach, the court has power to stop the trespassing by those within its jurisdiction irrespective of their claim that they are acting for others. Osborne v. Bank of United States, 9 Wheat. 738; State of Colorado v. Toll, Supt., 268 U. S. 228. This is not a bill to cancel the Secretary's Regulations, but only to test their efficacy to protect defend-

ants in their alleged trespass against complainant's rights. There is no more needed to make the Secretary a party for this purpose than to make the President a party because he promulgated the Code or the Congress because it enacted the statute."

Colorado v. Toll, 268 U. S. 228, 69 Law Ed. 927, was an action to enjoin the Superintendent of a National Park from enforcing regulations of the Secretary of the Interior for the government of the park. The Court says:

"The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi sovereign authority of the state. There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant without joining either his superior officers or the United States."

In *Philadelphia Co. v. Stimson,* 223 U. S. 605, 56 Law Ed. 570, the case was decided on demurrer to the Bill of Complaint. Among the grounds of demurrer presented were the following:

"1. This proceeding is virtually a suit against the United States.

"2. This court has no jurisdiction to restrain the enforcement of a penalty or prosecution for violation of law.

"3. This court has no jurisdiction to restrain the defendant from instituting criminal proceedings against complainant."

The Court says:

"First: If the conduct of the defendant constitutes an unwarrantable interference with property of

the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. * * * And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. * * * And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.

"Second: The second and third grounds of demurrer, specially stated, raise the question as to the jurisdiction of the court to restrain the defendant from instituting criminal proceedings.

"A court of equity, said this court in Re Sawyer, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482, 'has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors. . . . To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, . . . is to invade the domain of the courts of common law, or of the executive and administrative department of government.' * * * But a distinction

obtains when it is found to be essential to the protection of the property rights, as to which the jurisdiction of a court of equity has been invoked, that it should restrain the defendant from instituting criminal actions involving the same legal questions. This is illustrated in the decisions of this court in which officers have been enjoined from bringing criminal proceedings to compel obedience to unconstitutional requirements. * * * In this, there is no attempt to restrain a court from trying persons charged with crime, or the grand jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal procedure to enforce illegal demands.

"It is urged that the statute authorizing the Secretary of War to prevent encroachments upon navigable streams is a valid one, and that the decisions cited do not apply. The validity of the statute is not attacked, because of the assumption that it is not to be construed to contemplate or authorize the alleged deprivation of property. Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing, in the name of the state, unwarrantable exactions or restrictions to the irreparable loss of the complainant, which is the basis of the decree. * * * And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property."

Regarding the adequacy of the remedy at law, the Supreme Court, in *Ex Parte Young,* 209 U. S. 123, 52 Law Ed. 714, says:

> "It is further objected that there is a plain and adequate remedy at law open to the complainants, and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey an act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was therafter continued and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and, if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery. * * *
>
> "We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment, * * * but the facility of providing it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible.
>
> "To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment

> if it should be finally determined that the act was valid. This risk the company ought not to be required to take."

The latest expression of the Supreme Court on the subject, which we have been able to find, is in the opinion of *Sterling v. Constantin*, 287 U. S. 378, 77 Law Ed. 375.

This was an action in which the lower court issued a permanent injunction against the Governor and other officers of Texas, restraining them from enforcing the order for curtailment of oil production which was sought to be enforced by declaring martial law and calling out the state troops. The Supreme Court sustained the judgment and on the question of jurisdiction said:

> "The District Court had jurisdiction. The suit is not against the state. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal Courts, in order that the persons injured may have appropriate relief."

The Court then cites the cases which we have already cited.

The present case presents even a more serious situation than was presented in that case. Here there is no opportunity afforded to make a defense in a court of law. In the *Young* case, an arrest might have been made or an action commenced to collect the penalty as soon as the violation occurred. Here there can be no legal action until all of the damage has been done—until the license

has been revoked and plaintiffs continue in business thereafter.

The property and good will of plaintiffs' businesses has then been destroyed; their relations with their customers has been interrupted, the penalties have accrued and they are without remedy for the damage that has been done. If in the meantime they make the unlawful payments demanded of them by the Market Administrator, their property has been taken without due process of law. There would not even be the possibility of recovery of the monies, so paid, because the Market Administrator is not personally liable and the monies are collected to meet his expenses and to make adjustment payments to other individuals. If they made the payments the money is lost to them forever; if they do not make them, they face the penalties without any possibility of legal relief—except through the equitable relief of this court, until they have been put out of business.

Certainly that is neither a plain, or a speedy or an adequate remedy. It falls so far below that which would be obtained in a court of equity, that comparison is scarcely possible.

They argue that we may make application for reinstatement. But how is this a remedy if plaintiffs never have been subject to the license. Reinstatement, according to the regulations, must be "conditioned upon the applicant's future compliance with the terms and conditions of the license," and expressly does not exempt from fines and penalties incurred. If the license is void, that is worse than no remedy.

From these authorities it seems clear that the allegations of the Bill of Complaint state a cause of action for equitable relief by injunction. The Bill sets forth that irreparable injury to the property rights of plaintiffs is about to be inflicted by defendants claiming to act pursuant to a law which it is alleged violated the Federal Constitution and pursuant to license which it is alleged are beyond the power of the Secretary of Agriculture to impose. The temporary injunction must therefore be sustained unless from the facts now before the Court it is apparent that the law is constitutional and the licenses and all of their provisions are valid and within the power of the Secretary and his appointees. (Bill of Complaint, paragraphs VI, XXI, XXII, and XXIII.)

The Bill of Complaint and Supplemental Bill of Complaint Allege Sufficient Facts to Show Danger and Irreparable Injury to the Plaintiffs.

The plaintiffs' bill of complaint and supplemental bill of complaint show an attempt from the moment License No. 17 became effective, and from the time License No. 57 became effective, on the part of defendants for the respective defendants named in the respective licenses, to enforce the same against the plaintiffs. Statements were forwarded by Los Angeles Milk Industry Board and Milk Producers, Inc., under License No. 17, claiming payment of moneys to them. The license itself attempted to fix the price at which the plaintiffs should purchase and dispose of milk under License No. 57, and the Market Administrator did likewise in fixing prices, making demands for payment of moneys by the plaintiffs. The

plaintiffs contested the right of anyone acting under the terms of License No. 17 to interfere with their respective businesses and refused to comply therewith upon the theory that the license had no application to them, that as to them the license and the Act under which authority it was purported to issue was unconstitutional and void. Thereupon the Secretary of Agriculture haled them before him in an effort to enforce obedience thereto, plaintiffs protesting as to the lack of jurisdiction over them and their businesses. During the hearing License No. 57 became effective, and thereafter the Secretary revoked it as to the plaintiffs. The Agricultural Adjustment Act provides for an extreme penalty for operating without a license.

Thereafter, under the provisions of License No. 17, one of the defendants, Milk Producers, Inc., commenced an action against one of the plaintiffs, Lucerne Cream & Butter Company, to collect moneys claimed owing under the terms of said license.

It will be easily seen where the irreparable injury to the plaintiffs lies, and further their reasons for bringing the instant action and seeking the relief therein sought. To prevent an unwarranted interference with their respective business, which if acquiesced in would have the effect of putting them out of business, causing them to lose a large investment therein running into many thousands of dollars. The direct injury has been suffered and more direct injury is threatened. It is and has been since the promulgation of the first license our claim that the acts complained of were beyond the power of persons committing them, and that the persons so committing

such act have no warrant in law or otherwise for their attempted interference with the businesses of the respective plaintiffs. The Secretary of Agriculture has done all that he could in revoking the licenses of the plaintiffs. Thereafter the situation is as though he had dared the plaintiffs to continue in business. Clearly no more unwarranted interference can be found, if the plaintiffs are correct in their contention that his authority for the acts committed by him and his subordinates is not found in law or in equity.

In commenting upon *Chamber of Commerce vs. Federal Trade Commission,* 280 Fed. 45, relied upon by appellants in this behalf, we would point out that this is not a preliminary hearing, as in that case, sought to be restrained, but a restraint sought after certain acts have been committed and the result complete but attack made upon the jurisdiction of the parties so committing the act, and further that the jurisdictional points were raised, argued and overruled by the so-called administrative branch of the government. The answer to the whole contention of appellants is found in one of their cases, to-wit, *South Porto Rico Sugar Co., et al. vs. Munoz,* 28 Fed. 2d. 820:

> "Judicial interference apart from express statutory delegation must be grounded upon a legal encroachment upon property rights."

In the instant case the encroachment has taken place, and the Secretary of Agriculture and his subordinates, and those named with the enforcement of the license, have adhered "to an erroneous view as to the nature and extent of their jurisdiction."

The case of *Yarnell vs. Hillsboro Packing Co.,* 70 Fed. 2d. 435, is replied upon by appellants. However, a study of this case defeats its attempted application. In opinion the Circuit Court says:

> "It may be that appellants will undertake to go further than they have yet done and assume authority directly or as the Secretary's agents. * * *,"

and remanded the case to the District Court for necessary future amendment in the event of such happening. In that case the parties sought to be restrained had gone no further than in the making of threats. We have a different situation in the instant case. There have been demands for payment of moneys made, and in one instance a suit brought to recover the same, clearly a different showing, and the case is interesting in answering another contention of the plaintiffs—page 438,

> "but if these regulations are indeed invalid the control committee cannot shield themselves behind the Secretary or compel compliance therewith in his name."

The case of *Appalachian Electric Power Company vs. Smith,* 67 Fed. 2d. 451, contains as a statement of general law on this question the following language:

> "It is well settled of course that equity will in a proper case restrain officials of the government from acts constituting an invasion of individual rights, where such acts are not authorized by statute or *where the statute authorizing them is void because in conflict with some provision of the constitution."*

In that case the facts are different than in the case at bar. There the defendants were not threatening any

action. In the instant case the actions have been completed and the threats given effect to, and in fact an attempt made to perfect the demands by the bringing of an action in a court of law.

The correct rule is stated in *Galardo vs. Porto Rico, etc., Co.,* 18 Fed. (2d.) 918, where the Court says:

> "The plaintiff attacks the whole undertaking as invalid; if this contention be sound, it is clear that the threatened injury was imminent and a suit to test the power was most appropriate and timely. * * * If the plan for governmental development of hydro-electric power be unauthorized the plaintiff is entitled to be free from such possibly damaging competition."

The Case Was Not and Is Not Moot

Appellants state under their first point, page 15 of their brief:

> "That upon the revocation of his or its license by the Secretary, the appellee had so disposed of all his property theretofore used in distributing milk in the Los Angeles area."

This statement is contrary to the facts. The facts are (R. 284):

> "* * * * has only released and transferred that portion of its business having to do with the distribution of fluid milk within that territory known and described as the Los Angeles Sales Area. * * * The transfer of such portion of the business of said plaintiff was on account of its fear of prosecution and of the excessive and prohibitive penalties provided for in such license. * * * Said plaintiff intends to and will return to the business of distributing milk

for human consumption within said Los Angeles Sales Area when it can safely do so without the threat of penalties and prosecution hereinbefore mentioned."

The same statement is again made at R. 287. At R. 288, one of the appellees states:

"That it did sell a portion of its equipment which was located in the City of Los Angeles, California. This was solely because of the threat and menace of a fine of One Thousand Dollars per day. * * * But it is engaged in the business of distributing milk and cream at other places in the State of California and desires to and intends to engage in the business of distributing, marketing and handling milk and cream as a distributor in the Los Angeles Sales Area, and will again engage in said business as soon as the menace and threat of said unreasonable penalty and fine has been removed."

And at R. 290, another appellee states:

"It discontinued the business of distributing fluid milk within said Los Angeles Sales Area and thereafter sold, assigned and transferred that portion of its assets theretofore used by it in the business of such distribution of fluid milk within the said Los Angeles Sales Area. * * * Desiring and still desiring to continue to engage in the business of distributing fluid milk and cream in said Los Angeles Sales Area, and only discontinued such business because of the act of said Secretary of Agriculture in so purporting to revocate said license and cause all the large penalties, * * * not exceeding One Thousand Dollars per day each day such business is continued; * * * It is the intention to continue to re-engage in the business of distributing fluid milk in the event

its contentions set forth in the within action and in the original bill and supplemental bill filed herein are upheld in this Court, and it is freed from the threat of such excessive and oppressive penalties as hereinbefore set forth."

The original bill of complaint was filed herein on the 11th day of January, 1934. (R. 48). The License of appellees was revoked on the 28th day of July, 1934, by order of H. A. Wallace, Secretary of Agriculture, and the supplemental complaint of plaintiff herein, or the motion to file the same, was filed on the 9th day of August, 1934 (R. 55), which order was granted on the 4th day of September, 1934. That theretofore, appellant Milk Producers, Inc., had instituted an action about the month of August, 1934, against one of the appellees herein.

Paragraph XLVIII of the Supplemental Bill of Complaint reads as follows: (R. 103).

"That said defendant Milk Producers, Inc., did, on or about the 17th day of July, 1934, commence an action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled 'Milk Producers, Inc., plaintiff, vs. Lucerne Cream and Butter Company, et al., defendants,' being No. 376176 in the files and records of said court, to collect and recover judgment for the amounts claimed to be due said Milk Producers, Inc., by said Lucerne Cream and Butter Company under the terms and provisions of said purported License No. 17, as arbitrarily and illegally fixed by the defendant Los Angeles Milk Industry Board as surplus deductions to be made by said Lucerne Cream and Butter Company from its producers for the

periods from November 20, 1933, to May 31, 1934, both dates inclusive, as more particularly hereinbefore set forth in paragraphs X, XIII, XVI, XIX and XXII of this supplemental bill for injunction, and in the amounts as purportedly last fixed by the said Los Angeles Milk Industry Board as aforesaid, and threatens to and will institute similar actions against each of the other plaintiffs herein to collect like amounts as set forth in said paragraphs X, XIII, XVI, XIX and XXII aforesaid, and threatens to and will prosecute such suits to judgment unless restrained from so doing by order of this court."

We believe it to be a well established point of law that:

"It is not every change in circumstances that might be said to render a case a moot one which would require a dismissal of the appeal. Whenever the judgment, if left unreversed, will preclude the party against whom it is rendered, as to a fact vital to his rights, though the judgment if affirmed might not be directly enforceable by reason of lapse of time or change of circumstances, it cannot be said that merely a moot question is involved." 2 R. C. L. 170.

The case is not moot for the reason that each of the appellees are engaged in the milk business and each one of them as shown by their affidavits desire to re-engage in the business of distributing milk, which they are precluded from doing by fear of heavy penalties visited on them by the Secretary of Agriculture, the United States District Attorney, and the other appellants in this action. The cases quoted by the government in its brief *are no where close in point.*

Mills vs. Green, 159 U. S. 651, cited by appellant, is not in point as in that case the appellant therein sought an injunction against the Supervisor of Registration from supervising the registration of voters for a Constitutional Convention; that he was desirous of voting for delegates therein at this election to be held the third Tuesday of August, 1895. On September 4, 1895, the plaintiff and appellant appealed to the Supreme Court of the United States, and the appeal was entered on September 19, 1895. Thereafter the appeal was dismissed for no judgment of the Supreme Court could effect the result of that election.

Brownlow vs. Schwartz, 261 U. S. 216 relied upon by appellant. It was a case where plaintiff prayed for a Writ of Mandamus to require the building inspector to issue a permit to erect a building in Washington. Before the appeal reached the Supreme Court, the Inspector of Buildings issued the permit. The building was built and had been sold. The Court therefore dismissed the appeal for a judgment. Issuing a Writ of Mandate compelling the issuance of the building permit would have been a nullity as the building was already built.

The case of *Heitmuller vs. Stokes,* 256-359, is not in point. Plaintiff brought suit in the District of Columbia to recover possession of a building. Judgment went for the defendant. The plaintiff appealed to the Supreme Court of the District of Columbia. The Supreme Court entered judgment for the plaintiff. The only question involved was right of possession. Plaintiff sold the premises and made a showing before the Supreme Court that he was no longer entitled to the relief sought and the Supreme Court dismissed the action.

California vs. San Pablo, 149 U. S. 308, was a case where the State of California had sued the Railroad Company for taxes. During the pendency of the action before the Supreme Court the Railway Company tendered the money to the State and upon its refusal to accept, it deposited the same together with penalties, interest and attorney's fees in a Bank in accordance with the provisions of Section 1500 of the Civil Code of California.

The Supreme Court therefore dismissed the action because the case was moot.

As was stated by that Court on page 14:

> "The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it." The case is clearly not in point.

Appellants also rely upon *United States vs. Hamburg-American Company,* 239 U. S. 466. This was an action involving an action by the United States against steamship companies under the Sherman Anti-Trust Act. These companies had ceased their business by reason of the world war in 1915. The court took judicial knowledge of the European war and dismissed the action because the illegal combination had ceased to exist by reason of the cessation of steamship activities by reason of the war.

Commerce Cable Company v. Burleson, 250 U. S. 360, was dismissed by the Supreme Court because the property of the Cable Company had been restored to it by Presidential order. Therefore, judgment ordering its

restoration could not do more than already had been done in the case.

The case of *United States v. Anchor Coal Company,* 279 U. S. 812, and is a percuriam opinion setting forth no facts. The correct application of the law, we submit, is set forth in *United States v. Freight Association,* 166 U. S. 290, page 304, a motion was made upon affidavits to dismiss the appeal. The motion was denied and the Court said at page 308:

> "The defendants, in bringing to the notice of the court the fact of the dissolution of the association, take pains to show that such dissolution had no connection or relation whatever with the pendency of this suit, and that the association was not terminated on that account. They do not admit the illegality of the agreement, nor do they allege their purpose not to enter into a similar one in the immediate future. On the contrary, by their answers the defendants claim that the agreement is a perfectly proper, legitimate and salutary one, and that it or one like it is necessary to the prosperity of the companies. If the injunction were limited to the prevention of any action by the defendants under the particular agreement set out, or if the judgment were to be limited to the dissolution of the association mentioned in the bill, the relief obtained would be totally inadequate to the necessities of the occasion, provided an agreement of that nature were determined to be illegal. The injunction should go further, and enjoin defendants from entering into or acting under any similar agreement in the future. In other words, the relief granted should be adequate to the occasion."

Also in *Southern Pacific Terminal Company vs. Interstate Commerce Commission,* 219 U. S. 498, the Court denying the motion to dismiss, said:

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

Again, in the recent case of *Abie State Bank v. Bryan,* 282 U. S. 765, where the law of assessments was repealed by the Nebraska legislature, and a motion to dismiss the appeal was made, Mr. Chief Justice Hughes delivering the opinion, at page 781, said:

> "The appellees, who are state officers, urge that by this legislation the case has become moot. The appellants, and the appellees who are intervening depositors, assert the contrary, and we agree with the latter view. Despite the repeal of section 8028, the assessment of December 15, 1928, which was assailed in this suit, is continued in effect, and the amount due thereunder is made a part of the depositors' final settlement fund. The later special assessments, to which the new act refers (those of April 17, 1929, and January 2, 1930), also remain in force. While the repeal of section 8028 prevents further assessments under the old law, still assess-

ments which were enjoined by the District Court, and which were sustained by the judgment of the Supreme Court, are to be paid, and the amounts are to be applied as the act of 1930 directs. If, taking into consideration the limitations of the new legislation, the appellants could still be considered to have constitutional grounds for objecting to the collection of the special assessments which were the subject of their petition, they are not deprived of their right by the statute which leaves them with liability for those assessments. It would still be possible for this Court to grant appropriate relief. Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 433. See Groesbeck v. Duluth, South Shore & A. Ry. Co., 250 U. S. 607, 609; Boston v. Jackson, 260 U. S. 309, 313."

Groesbeck v. Duluth, South Shore & Atlantic Railway Co., 250 U. S. 607; 63 L. Ed. 1167. The Michigan law fixed a two cent rate on railroads. This action was to enjoin the enforcement of that law. Before the appeal was heard, the statute was repealed, and it was argued that the question had become moot. The Court said:

"But the case has not become moot for the following reason: On continuing the restraining order the Railway was required to issue to all intrastate passengers receipts by which it agreed to refund, if the act should be held valid, the amount paid in excess of a two-cent fare. Later the Railway was required to deposit, subject to the order of the court, such amounts thereafter collected. The fund now on deposit exceeds $800,000, and the refund coupons are still outstanding. In order to determine the rights of coupon holders and to dispose of this fund it is necessary to decide whether the Act of 1911 was, as respects this railroad, confiscatory."

We therefore respectfully submit that the point is not well taken, that the question is not moot, for the reasons shown herein, to-wit: That plaintiffs and appellees are each still engaged in business; that they are still subject to suits and demands by the defendants and appellants, and that the Court therefore properly issued its injunction.

Conclusion

In conclusion we respectfully submit that this Court is now asked to find on the *argument of an ex parte affidavit and without any action or declaration by Congress that that which has heretofore uniformly been held by the Court not to be within the commerce clause has by reason of the depression become subject to the commerce clause* and to sustain an administrative license purporting to be issued under color of authority of a statute which goes no further than to authorize licenses "in the current of interstate or foreign commerce," and when such licenses on their face purport only to attempt to regulate production and distribution of milk in a small defined area entirely within one state.

We submit that under the law these licenses cannot be sustained and that, therefore, the injunction was properly issued.

Respectfully submitted,

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No. 7657

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY W. BERDIE, et al,
Defendants and Appellants,

vs.

CHARLES J. KURTZ, et al,
Plaintiffs and Appellees.

SUPPLEMENTAL BRIEF OF APPELLEES

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In the

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY W. BERDIE, et al,
Defendants and Appellants,

vs.

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Plaintiffs and Appellees.

SUPPLEMENTAL BRIEF OF APPELLEES

Come now the Appellees and by leave of Court first had and obtained, file this, their supplement to appellees' brief heretofore filed herein.

Paragraph XLVIII of the Supplemental Bill alleges that defendant, Milk Producers, Inc., did, on or about the 17th day of July, 1934, commence an action in the Superior Court of Los Angeles County against Lucerne Cream & Butter Company to collect and recover judgment for the amount claimed to be due Milk Producers, Inc., from Lucerne Cream & Butter Company under the terms and provisions of License No. 17 as illegally fixed by the defendant Los Angeles Milk Industry Board, for the period November 20, 1933, to May 31, 1934, and threatens to and will institute similar actions against each of the other plaintiffs herein, to collect like amounts

and threatens to and will prosecute such suits to judgment unless restrained from so doing by order of this Court.

These allegations are not denied, but, on the contrary, are expressly admitted in the affidavits filed by these parties.

It will be seen that the suit in the State Court was commenced six months after this action was commenced in the Federal Court and involves exactly the same subject matter, to-wit, the validity of the charges made by Los Angeles Milk Industry Board and Milk Producers, Inc., which in turn involves the validity of License No. 17 and the Agricultural Adjustment Act under which it purports to have been issued, and the validity of the provisions of License No. 57 attempting to continue obligations under the old License.

Counsel have raised the point that the Federal Court has no jurisdiction to restrain proceedings in a State Court, citing as authority therefor, Section 379 of the United States Codes, Anno., which is Section 265 of the Judicial Code. The provisions of this section are the same as were formerly contained in Section 720 of the Revised Statutes. We find, however, that such is not the rule.

15 *Corpus Juris,* 1179:

> "Exceptions to the rule, however, exist where action by the federal court may be necessary to render effective a decree of such court; or where such court has been vested with priority of jurisdiction over the subject matter and the parties, and in order to protect its jurisdiction it is necessary to enjoin

the proceedir ; in the state court, as in case of bankruptcy proceedings, or where the state court was without jurisdiction. So also a federal court, where the circumstances necessary to give it jurisdiction exist, may enjoin the enforcement of a judgment of a state court in a proper case."

Simpkins Federal Practice, Sec. 740, page 696:

"By Section 265 of the Judicial Code, injunction shall not be granted to stay proceedings in a state court except in bankruptcy cases. . . . HOWEVER WE SHALL SEE FURTHER THAT THE LIMITATION DOES NOT APPLY TO AN INJUNCTION ISSUED BY THE FEDERAL COURTS IN DEFENSE OF ITS JURISDICTION OF A CAUSE OF ACTION WHEN THE RES IS IN POSSESSION OF THE COURT."

Section 742, page 697:

"Section 265 of the Judicial Code does not apply when the court is seeking to maintain its own jurisdiction over the subject matter, the possession of which has been first obtained by the court."

15 *Corpus Juris,* page 1180:

"It has also been held that a federal court may . . . prevent a person from being subject to a multiplicity of suits."

Iron Mountain R. Co. v. City of Memphis, 96 Fed. 113-131:

"We conclude, therefore, that the bill stated a good cause of action on the ground that the resolu-

tion of the city of March 25, 1898, impaired the obligation of the contract under which the railroad company occupied Kentucky Avenue. . . . This gave to the court below jurisdiction of the whole controversy between the city and the railroad company; and, inasmuch as the suit had been brought a considerable time before the state suits were brought, it justified and required the court below to enjoin the suits in the state court as an impairment of its jurisdiction over the controversy with which it had been invested by the filing of the bill. That such a remedy is not in conflict with section 720 of the Revised Statutes, forbidding the federal courts to issue injunctions against proceedings in a state court, is abundantly established by authority."

Phelps v. Mutual Reserve Fund Life Association, 112 Fed. 453, 465:

"Thus it has been held that the statute (section 720) does not prevent a court of the United States from protecting its own prior jurisdiction over the property in controversy" (citing Iron Mountain R. Co. v. City of Memphis, supra).

In *Kansas City Gas Co. v. Kansas City,* 198 Fed. 500, at *page* 526, the Court said:

"VII. There remains to consider whether the suit subsequently brought by defendants in the state court produces a conflict with a prior jurisdiction of the same parties and subject-matter in this court, and whether the injunctive process of this court should be extended to restrain defendants from prosecuting that suit until the issues in this case have been fully determined. The rule is well settled that, when the jurisdiction of a court of the

United States has attached, the right of the plaintiff to prosecute his suit in such court to a final determination there cannot be arrested, defeated, or impaired by any subsequent action or proceeding of the defendant respecting the same subject-matter in a state court. Mr. Justice Field, in Sharon v. Terry (C.C.), 36 Fed. 337:

" 'It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For, if any one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process of contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice.' Peck v. Jennes, 7 How. 612-624, 12 L. Ed. 841; Moran v. Sturgis, 154 U. S. 256-269, 14 Sup. Ct. 1019, 38 L. Ed. 981.

"In Starr et al v. Chicago, R. I. & P. Ry. Co. et al (C.C.) 110 Fed. 3, Judge Sanborn said:

" 'Wherever a federal court and a state court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. * * *

" 'The court which first obtains jurisdiction of the subject-matter and of the necessary parties to a suit may, and if it discharges its duty it must, if necessary, issue its injunction to prevent any interference by any one with its effectual determination of the issues, and its administration of the rights and remedies involved in the litigation.'

"The Supreme Court, in Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, states the proposition thus:

" 'When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases.'

"See, also, Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (NS) 932, 14 Ann. Cas. 764.

"In United States v. Eisenbeis et al (C.C.A.), 112 Fed. 190, 50 C. C. A. 179, the court said:

" 'The general rule is well settled that, where different courts have concurrent jurisdiction, the court which first acquires jurisdiction of the parties, the subject-matter *the specific thing,* or the property in controversy, is entitled to retain the jurisdiction to the end of the litigation, without interference by any other court. It is the duty of the court which first obtains *full and complete* jurisdiction over the *whole* case to keep control of it, to the exclusion of the other court that had not obtained such full jurisdiction and to grant the relief prayed for. This general principle is well settled. The only difficulty lies in its application to the facts of any given case.'

"And so it is said in Prout v. Starr, 188 U. S. 537-544, 23 Sup. Ct. 398, 47 L. Ed. 584:

" 'The jurisdiction of the Circuit Court could not be defeated or impaired by the institution, by one of the parties, of subsequent proceedings, whether civil or criminal, involving the same legal questions, in the state court.'

"In Rodgers v. Pitt (C.C.), 96 Fed. 668-70, the reason of the rule is thus emphasized:

" 'This rule is important to the exercise of jurisdiction by the courts whose powers are liable to be exerted within the same spheres and over the same subjects and parties. There is but one safe road for all the courts to follow. By adhering to this rule, the comity of the courts, national and state, is maintained, the rights of the respective parties preserved, and the ends of justice secured, and all unnecessary conflicts avoided. Any other rule would be liable at any time to lead to confusion, if not open collision, between the courts, which might bring about injurious and calamitous results. This rule is elementary law, and a citation of all the authorities in its support would be endless and useless.'

"Where the federal questions raised by the bill are not merely colorable but are raised in good faith and not in a fraudulent attempt to give jurisdiction to the Circuit Court, that court has jurisdiction, and can decide the case on local or state questions only, and it will not lose its jurisdiction of the case by omitting to decide the federal questions or deciding them adversely to the party claiming their benefit. Siler et al v. Louisville & Nashville R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; Risley et al v. City of Utica et al (C.C.), 179 Fed. 875-882."

In the case of *St. Louis Min. & Mill Co. v. Montana Mining Co.,* 148 Fed. 450, at page 454, the Supreme Court in construing the decision in the case of *Julian v. Central Trust Co.,* 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 624, said:

> "In such cases," said the court, "where the federal court acts in aid of its own jurisdiction, and to render its decree effectual, it may, notwithstanding section 720, Rev. St., restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction." (Cited in Riverdale Mills v. Mfg. Co., 198 U. S. 196); 25 Sup. Ct. 620, 49 L. Ed. 1008; Dietzsch v. Huidekoper, 103 U. S. 494.)

Sovereign Camp, v. O'Neill, 266 U. S. 292, 69 L. Ed. 293, at page 296:

> "The jurisdiction thus acquired was not taken away by Sec. 265 of the Judicial Code, providing that, except in bankruptcy cases, 'the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state.' This section does not deprive a district court of the jurisdiction otherwise conferred by the Federal statutes, but merely goes to the question of equity in the particular bill; making it the duty of the court, in the exercise of its jurisdiction, to determine whether the specific case presented is one in which relief by injunction is prohibited by this section or may nevertheless be granted. Smith v. Apple, 264 U. S. 278, 68 L. Ed. 680."

In *Wells Fargo & Co. vs. Taylor,* 254 U. S. 175, 65 Law Ed. 205, the Supreme Court considers the meaning and

effect of the Statute here relied upon by appellees and says:

> "The provision has been in force more than a century, and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity, and, like that rule, is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the Federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which, of course, is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of Federal and equity jurisdiction are present, the provision does not prevent the Federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States (Ex parte Young, 209 U. S. 123, 52 L. ed. 714; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131; Missouri v. Chicago, B. & Q. R. Co., 241 U. S. 533, 538, 543, 60 L. ed. 1148, 1154, 1156), *or prevent them from maintaining and protecting their own jurisdiction properly acquired and still subsisting, by enjoining attempts to frustrate, defeat, or impair it through proceedings in the state courts* (French v. Hay (French v. Stewart), 22 Wall. 250, 22 L. ed. 857; Julian v. Central Trust Co., 193 U. S. 93, 112, 48 L. ed. 629, 639; Chesapeake & O. R. Co. v. McCabe, 213

> U. S. 207, 219, 53 L. ed. 765, 770; Looney v. Eastern Texas R. Co., 247 U. S. 214, 221, 62 L. ed. 1084, 1087), or prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience. (Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870; Ex parte Simon, 208 U. S. 144, 52 L. ed. 429; Simon v. Southern R. Co., 236 U. S. 115, 59 L. ed. 492; Public Service Co. v. Corboy, 250 U. S. 153, 160, 63 L. ed. 905, 908; National Surety Co. v. State Bank, 61 L. R. A. 394, 56 C. C. A. 657, 120 Fed. 593.)"

From the foregoing authorities, it can be plainly seen that this action, having been instituted in January, 1934, and attacking the constitutionality and validity of the Agricultural Adjustment Act and of the Licenses purportedly issued thereunder, to-wit, Licenses Nos. 17 and 57, should restrain any proceedings between the *same parties,* wherein one of the defendants, to-wit, Milk Producers, Inc., institutes an action against one of the plaintiffs to recover a money judgment in the state courts for the deductions and charges claimed due under the provisions of License No. 17.

To permit the defendant, Milk Producers, Inc., to maintain such action and other and further actions against the other plaintiffs in this case, would lead to an endless confusion; for the state court might refuse to pass upon the constitutionality or validity of the federal questions involved, and order a money judgment in that case, and then this Court, as we believe, would declare the Act and the Licenses issued thereunder, void and unconstitutional,

and we would then have the picture of the first court acquiring jurisdiction, declaring the Act unconstitutional and a second court assuming jurisdiction many months after the institution of the first action, giving a judgment thereon. This would be an anomalous situation, and would lead to the very confusion and conflicts mentioned by the courts in the foregoing points and authorities.

Respectfully submitted,

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No. 7657

In the United States Circuit Court of Appeals for the Ninth Circuit

HARRY W. BERDIE, ET AL., APPELLANTS

v.

CHARLES J. KURTZ, ET AL, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY AND SUPPLEMENTAL BRIEF FOR APPELLANTS

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INDEX

CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY AND SUPPLEMENTAL BRIEF FOR APPELLANTS

Appellants wish to reply to some of the contentions raised by appellees in their brief, and to clarify some of the issues already discussed in appellants' original brief. These contentions will be answered under the following headings: (1) The bill of complaint should have been dismissed because the case was moot at the time the injunction was entered; (2) the deductions from payments to producers provided for in the Licenses are not a tax; (3) under section 8 of (3) of the Agricultural Adjustment Act, the Secretary of Agriculture has

the power to issue Licenses which fix prices which distributors of agricultural commodities must pay to producers; (4) section 8 (3) of the Agricultural Adjustment Act is not an unconstitutional delegation of legislative power to the Secretary of Agriculture; (5) section 8 (3) of the Agricultural Adjustment Act does not unconstitutionally confer judicial power upon the Secretary of Agriculture; (6) License No. 57 is not invalid as an *ex post facto* law; and (7) the Licenses are valid regulations of interstate commerce.

ARGUMENT

I

The Bill of Complaint should have been dismissed because the case was moot at the time the injunction was entered

Appellees admit in their brief on page 163 that they have transferred that portion of their business "having to do with distribution of fluid milk within that territory known and described as the Los Angeles Sales Area." They argue that because they still distribute milk *outside* the Los Angeles Sales Area the case is not moot. This argument is wholly fallacious because the License regulates distribution only in the Los Angeles Sales Area (R. 118) and hence before this injunction was issued and at the present time appellees are subject to no penalties under section 8 (3) of the Act. *They have voluntarily removed themselves*

from the operation of the Act and the License just as effectively as if they had gone out of business altogether. Their motives in so doing are immaterial. (See *Brownlow* v. *Schwartz,* 261 U. S. 216, discussed in our original brief on page 17.)

The situation here is no different than if appellees had disputed the validity of a tax and then had paid the tax before the entry of a decree in the legal proceedings. The United States Supreme Court has decided several times that such payment even under protest makes the question moot, since *no existing controversy* is present.

Some of these cases are:

> *San Mateo County* v. *Southern Pacific Ry.,* 116 U. S. 138.
>
> *Little* v. *Bowers,* 134 U. S. 547.
>
> *California* v. *San Pablo, etc., R. R.,* 149 U. S. 308.

The efforts of appellees to dispose of the cases cited in our original brief, pages 16–22, are futile since none of the cases cited by them overrule or modify the principle set out in *Mills* v. *Green,* 159 U. S. 651. This principle is:

> * * * If the intervening event is owing *either to the plaintiff's own act* or to a power beyond the control of either party, the Court will stay its hand. (Italics ours.)

The principle for which we here contend has been reaffirmed by the Supreme Court of the United States in a case decided since the submission of

our original brief. In *Amazon Petroleum Corp.* v. *Ryan* (decided January 7, 1935), the plaintiff filed its bill to enjoin federal officials from enforcing Section 4 of Article III of the Code of Fair Competition for the Petroleum Industry, approved by the President pursuant to the National Industrial Recovery Act.[1] By an Executive Order of September 13, 1933, modifying certain provisions of the Code, the paragraph in question was eliminated. It was reinstated by Executive Order of September 25, 1934. The suit was instituted in October 1933. However, neither the plaintiff nor the Government was aware of the fact that the portion of the Code involved in the case had been eliminated by the Executive Order, and the case was tried and decided by the District Court and by the Circuit Court of Appeals upon the false assumption that Section 4 was in effect. The elimination of this section was discovered and called to the attention of the Court only after the case had been docketed in the Supreme Court. The Government advised the Court that it could not and, therefore, did not intend to prosecute the plaintiffs for violations of Section 4 committed prior to September 25, 1934, but that if the plain-

[1] In a subsequent portion of this brief we shall discuss that portion of the Court's opinion dealing with the constitutionality of Section 9 (c) of the National Industrial Recovery Act. At this point we are concerned solely with that portion of the opinion dealing with Section 4 of Article III of the Code of Fair Competition.

tiffs should violate this section subsequent to September 25, 1934, the Government would prosecute.

The Court, however, on this state of the record, refused to pass upon the constitutionality of Section 4 of the Petroleum Code or otherwise to consider the merits of this branch of the case. In this connection the Court said:

> The case is not one where a subsequent law is applicable to a pending suit and controls its disposition (Citing cases). When this suit was brought, and when it was heard, there was no cause of action for the injunction sought with respect to the provision of Section 4 of Article III of the Code; as to that, there was no basis for real controversy. See *California* v. *San Pablo,* 149 U. S. 308, 314; *United States* v. *Alaska Steamship Co.,* 253 U. S. 113, 116; *Barker Co.* v. *Painters' Union,* 281 U. S. 462.
>
> If the Government undertakes to enforce the new provision, the petitioner as well as others, will have an opportunity to present their grievance, which can then be considered, as it should be, in the light of the facts as they will then appear.

Thus even though the plaintiff in the *Amazon* case was subject to prosecution for violations of Section 4 of the Code at the time the case was decided by the Supreme Court, and even though the case had not been rendered moot by the act of plaintiffs, but rather by the act of the Government, the Court refused to consider the merits. In the case

at bar plaintiffs were not subject to prosecution at the time the injunction was granted; they are not subject to prosecution now. *By their own acts* in ceasing to do business in the Los Angeles Sales Area they have rendered the License wholly inapplicable and ineffective as to themselves. As in the *Amazon* case, there was no cause of action for the injunction which plaintiffs sought at the time the order appealed from was entered; they, by their own acts, had destroyed all basis for any real controversy.

We respectfully submit that on the authority of the *Amazon* case and the other cases which we have cited, the bill of complaint should be dismissed.

II

The deductions from payments to producers provided for in the Licenses are not a tax

In their brief, pages 72–79, appellees set forth arguments which are valueless when the nature of the deductions there relied upon is examined. Each of these arguments is based on the assumption that the deductions provided for in the Licenses are "taxes." As we pointed out in our original brief (p. 83) these deductions or charges are not taxes, levied under or referable to the revenue clause of the Constitution, but are a necessary and proper incident to the exercise of the commerce power. These deductions, as explained in our original brief (p. 83), are of two kinds: (1) deduc-

tions per pound of butterfat from the prices paid producers to provide for the expenses of administering the License and to provide specified services to producers; (2) payments by some distributors to be paid out to other distributors, in order equitably to allocate the burden of the surplus milk in the market among all producers. No further obligation is imposed on distributors except that *they pay fixed prices for all milk purchased.*

These charges are not, therefore, revenue measures (as this term is accurately used when the taxing power has been exercised), but an appropriate incident to what has been shown in our original brief to be a permissible regulation of interstate commerce. It is apparent that this plan to regulate the marketing of milk in the Los Angeles Sales Area cannot be self-executing; it requires the expenditure of moneys for services necessary to be rendered in the performance of the plan.

The Supreme Court, in a number of cases, has sustained assessments similar to that involved in the case at bar, and has carefully distinguished such assessments from taxing measures. Thus, in the *Head Money Cases,* 112 U. S. 580, Congress, in the exercise of its commerce power, enacted a statute for the purpose of regulating immigration. This statute provided that owners of vessels transporting immigrants must pay certain charges for the purpose of creating a fund to care for needy immigrants and of defraying administrative expenses

incurred in connection therewith. The argument was presented, as in the instant case, that the charge was an invalid exercise of the taxing power. The Supreme Court held, however, that the charge imposed was not a tax but was an appropriate incident to the power of Congress under the Commerce Clause (p. 595).

> But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration. The title of the Act, "An Act to regulate immigration", is well chosen. It describes, as well as any short sentence can describe it, the real purpose and effect of the statute.

The distinction between an exercise of the taxing power and an appropriate and valid assessment incidental to the exercise of some other power of the Government is clearly brought out by certain Supreme Court decisions dealing with state inspection statutes. In these cases the states, in the exercise of their police power, levied assessments upon certain commodities which were subjected to inspection. In every case where the assessment was only for the purpose of defraying the expenses of inspection, and not for the purpose of securing general revenue in addition thereto, the assessment has been upheld. *Pure Oil Co.* v. *State of Minnesota,*

248 U. S. 158; *Patapsco Guano Co.* v. *North Carolina Board of Agriculture,* 171 U. S. 345. However, where the amount of the assessment clearly exceeded the funds necessary to defray inspection costs, and this excess was to be used for the purpose of supplying the State with general revenue, the assessment has been held invalid on the ground that it is a taxing measure. *Postal Telegraph-Cable Co.* v. *Taylor,* 192 U. S. 64.

The deductions which are authorized under the Licenses cannot be used for any purposes except for those specified in the Licenses. This fact, plus the fact that none of these assessments are paid into the Treasury of the United States, clearly show that these are not taxes. They are clearly only incidental to the regulatory scheme which the Secretary has provided for in the License.

III

Under section 8 (3) of the Agricultural Adjustment Act, the Secretary of Agriculture has the power to issue licenses which fix prices which distributors of agricultural commodities must pay to producers

Appellees assert, on page 97, of their brief, that at no place in the Act is there any language to indicate an intention to confer upon the Secretary of Agriculture the power to fix prices, and, hence, that the price-fixing provisions of the License are beyond the power of the Secretary under the Act.

The licensing provisions of the Act are set forth on pages 3 to 6 of our original brief. It may at

once be conceded that these provisions do not expressly and specifically mention price-fixing. It may likewise be conceded that the language there quoted is general language and requires judicial interpretation. Appellants earnestly contend, however, that Congress has left no doubt on the subject that price-fixing is among the terms and conditions which may be incorporated into such a License.

We take it that no citation of authorities is necessary to establish the fact that wherever statutory language requires interpretation, the courts will always attempt to ascertain the intention of Congress in passing the law; that no part of the statute will be considered nugatory and without meaning wherever it is possible to ascribe thereto a reasonable meaning which will be in harmony with the rest of the statute; and that the courts will not adopt any interpretation of the statute which will clearly defeat its policy.

Congress itself has removed all doubt as to (1) the economic conditions which called forth and "rendered imperative" the passage of the Agricultural Adjustment Act and (2) the *policy* of Congress in passing this statute.

The Declaration of Emergency (quoted at page 2 of our original brief) is an explicit declaration by Congress that, in its judgment, the present depression is, in part, the consequence of a severe and increasing disparity "between the *prices* of agricultural and other commodities"; that this price

disparity has largely destroyed the purchasing power of farmers for industrial products; that such price disparity has broken down the orderly exchange of commodities; that such price disparity has seriously impaired the agricultural assets supporting the national credit structure; and that all these results of the disparity between the prices of agricultural and other commodities have "affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities." Congress further found that the results of such disparity between such prices have rendered imperative the immediate enactment of Title I of the Act.

The outstanding fact which appears from these findings is that, in the opinion of Congress, one of the major causes of the economic crisis is the disproportionate decline in the *price* of agricultural products as compared with industrial products.

Immediately following the Declaration of Emergency is a Congressional Declaration of Policy. The language of this declaration is striking in its emphatic statement of the policy of Congress. Section 2 declares it to be the policy of Congress *to establish* and maintain *such balance between* the *production and consumption* of agricultural products *and such marketing conditions* therefor as will *reestablish prices* to farmers at a level that will give agricultural commodities a purchasing power, with

respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period (August 1909–July 1914). We think it must be conceded that this language is perfectly clear and is couched in extremely broad and comprehensive terms. We think it must likewise be conceded that *had* this language (which is contained in the Declaration of Policy) been incorporated in section 8 (3) there would have been no possibility of any such contention being seriously made as is made in this case. In other words, the language of the Declaration of Policy overwhelmingly shows the clear intention on the part of Congress to do something about establishing and maintaining marketing conditions which will reestablish prices to the farmers. It is obvious that the most direct, simple, and effective method for accomplishing this purpose is to fix the price which farmers shall receive for their products.

The purpose of Congress in passing this law being perfectly clear, we now turn to the means which Congress adopted to achieve this purpose. We find that Congress, wisely, has used very general and comprehensive language in section 8 (3). It has however, expressly stated its intention to incorporate into section 8 (3) the Declaration of Policy itself.

Section 8 provides:

> SEC. 8. *In order to effectuate the declared policy,* the Secretary of Agriculture shall have power—
>
> (1) To provide for reduction in the acreage * * *
>
> (2) To enter into marketing agreements * * *
>
> (3) To issue licenses * * *

It is, therefore, clear that the language contained in the declared policy (which, as we have seen, clearly embraces the power to fix prices) has been *expressly* incorporated into section 8 (3). We would therefore expect to find in section 8 (3) language empowering the Secretary to adopt measures to attain the objectives described in the declared policy by the means therein indicated. Section 8 (3) contains two sentences referring to the issuance of licenses. An examination of the first discloses that the power to issue licenses is *unlimited* except (1) that such licenses must effectuate the declared policy; (2) that the subject-matter must be an agricultural commodity, et cetera, and (3) that such commodity must be handled in the current of interstate commerce. There are no other restrictions on this power. Consequently, its exercise must be subject to a broad discretion. That discretion must be exercised within the area marked out by Congress for the Secretary in its declaration of policy which, as has been seen, clearly and amply includes price fixing.

It may, however, be contended that the second sentence of section 8 (3) constitutes a limitation on the first, and that a License may contain *only* such terms and conditions as may be necessary to eliminate unfair trade practices or charges, et cetera. While we deny that a proper interpretation of the second sentence requires it so to be construed, we will, for the moment, assume that the terms and conditions in a license issued under section 8 (3) are limited to those which are necessary to eliminate unfair trade practices or charges, et cetera. Even if this be granted, we vigorously contend that the language contained in the second sentence is sufficiently broad and comprehensive to include the power to fix prices. It may be urged that the phrase "unfair practices or charges" implies and connotes only such practices as misleading advertising, false representations in selling, and similar practices which the reputable part of the commercial world condemns as unethical and unfair. We submit that it is impossible to reconcile the theory that the Congressional purpose was merely to eliminate the usual forms of commercial dishonesty, with the solemn and serious language contained in the Declaration of Emergency, followed by the Declaration of Policy which left no doubt that the Congressional purpose was to wipe out the disparity between the prices of agricultural and other commodities.

Indeed, the licensing subsection itself contains an express finding by Congress that the unfair

practices or charges that are to be eliminated are those that "tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof." Eliminating the unethical and common practices of unfair competition is but a very feeble step towards ending the depression. It is impossible to believe that after the dramatic Declaration of Emergency and Declaration of Policy Congress should wind up in its statement of the important licensing powers granted to the Secretary by limiting him merely to the power to stop commercial cheating in its usual forms. We believe that opposing counsel's contention can be answered by a *reductio ad absurdum*. If all that Congress meant by the enactment of section 8 (3) was to confer power upon the Secretary to eliminate unfair competition, then it was merely repeating a law already upon the statute books. For section 5 of the Federal Trade Commission Act provides "that unfair methods of competition in commerce are hereby declared unlawful."

Further, it appears from the record in this case that the disastrous decline in the price paid to the producer of whole milk sold in Los Angeles, from $2.68 a hundredweight in 1929 to $1.52 in 1933 (R. 316), has resulted not only from a reduction in the consumptive demand for milk, but also from extended price cutting, price wars, and other methods of destructive competition among distributors, en-

gendered by the depression (R. 317). The record further shows that in the course of such price wars, distributors have reduced the price paid by them to the farmer below the point justified by the existing supply and demand situation, and that the prevalent price-cutting practices in the Los Angeles market endanger the supply of milk for fluid consumption by threatening to force producers and distributors out of business (R. 317–318). We respectfully submit that the price wars and price cutting described in the record in this case are clearly "unfair trade practices" within the meaning of that phrase as used in section 8 (3) of the Act; that they are precisely the kind of practices which Congress sought to eliminate by means of Licenses, for the reason that they "prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products (milk) and the financing thereof." It is further clear that the most direct, and indeed the only effective method, for eliminating the price-cutting practices prevalent in the Los Angeles Sales Area is by fixing the price which distributors must pay to producers for milk. This is precisely the means employed by the Secretary in the Los Angeles Milk Licenses.

Lastly, let us assume (which we deny) that the phrase "unfair trade practices and charges" etc., should be interpreted as the equivalent of the term "unfair competition", used in section 5 of the Fed-

eral Trade Commission Act. We then submit that, properly construed, the second sentence of section 8 (3) does not limit the terms and conditions which the Secretary may, by license, prescribe, but merely requires that every License must, *among other things,* prohibit such unfair competition.

For the foregoing reasons, we respectfully submit that the contention that price fixing is not a term or condition which section 8 (3) contemplated as proper in a License, is without merit.

IV

Section 8 (3) of the Agricultural Adjustment Act is not an unconstitutional delegation of legislative power

Appellees argue on pages 80–102 of their brief that in issuing the Licenses the Secretary is exercising an unconstitutionally delegated legislative power. The recent decision of the United States Supreme Court in *Panama Refining Co. et al.* v. *Ryan et al.* and *Amazon Petroleum Corp. et al.* v. *Ryan et al.,* decided January 7, 1935 (2 United States Law Week, p 409), definitely disposes of this contention. The Court there said:

> Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislation cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality which will enable it to perform its function in laying down poli-

> cies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.
>
> Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility * * *.

The Court examined all of the leading cases on the subject which we have discussed in our original brief (pages 86–90), and reaffirmed the principles upon which the delegation in these cases was upheld.

The only provisions of the National Industrial Recovery Act the constitutionality of which was involved in the *Panama* and *Amazon* cases was Section 9 (c). That section authorizes the President to prohibit the transportation in interstate commerce of petroleum produced in excess of the amount permitted to be produced by any state law. The Court considered this section in the light of the principles established in the cases above referred to and in the light of its definition of the limits of permissible Congressional delegation of power quoted above. The Court pointed out that Section 9 (c) itself contains *no standard whatsoever* to guide Presidential action. It does not set forth, even in the broadest general terms, the conditions which should guide the President in deter-

mining whether or not to exercise the authority delegated to him to prohibit the interstate transportation of petroleum. The Court then proceeded to examine the declaration of policy contained in the National Industrial Recovery Act and all of its other provisions to determine whether the standard, lacking in Section 9 (c), could be implied from any other portion of the Act. The Court found nothing in the declared policy of the Act limiting or controlling the authority conferred upon the President by Section 9 (c). Nor did it find in any other provision of the Act language, which, by reasonable implication, could be said to furnish the President with any standard for determining when to invoke the prohibition authorized by Section 9 (c).

Summarizing its conclusions on this branch of the case the Court said:

> As to the transportation of oil production in excess of State permission the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

The decision of the Supreme Court that Section 9 (c) was unconstitutional thus rests squarely upon the *complete absence* of any standard for Presidential action with respect to petroleum in the National Industrial Recovery Act.

In the preceding section of this brief we have seen that the exercise by the Secretary of the power to issue picenses pursuant to section 8 (3) of the Agricultural Adjustment Act is expressly limited by and conditioned upon compliance with the Declaration of Policy set forth in section 2 of the Act. The Declaration of Policy lays down an immediate objective standard in economic terms: The balancing of production and consumption and the establishment of marketing conditions for agricultural commodities which will secure to the farmer the same purchasing power for the products which he sells enjoyed by him during the period August 1909 to July 1914. The so-called "parity price" for agricultural products which the Declaration of Policy sets out as the goal to be achieved through the mechanisms provided by the Act is not a vague or uncertain concept. It is one which is definite and specific, susceptible of computation by mathematical formula. (See page 89 of our original brief and R. 320, 321.) Thus when Congress delegated to the Secretary of Agriculture the power, through the issuance of licenses pursuant to section 8 (3) of the Act, to effectuate the declared policy by raising the purchasing power of the American farmer to the parity level the Congressional mandate was definite and specific. We respectfully submit that such standard clearly meets the test required by the Supreme Court in the *Panama* and *Amazon* cases and the earlier decisions upon which the Court relies in its opinion.

The number of industries covered by the Agricultural Adjustment Act is innumerable. It appears from the record in this case that the Secretary has issued thirty-eight Licenses for milk alone. These are in effect in widely scattered areas having separate and distinct marketing problems which must be dealt with. In addition, Licenses have been issued for a wide variety of other agricultural products, with respect to each of which methods must be adopted to cope with specialized and peculiar problems. It is obvious that it would be impossible for Congress to specify the host of detailed regulations which must be included in each License issued by the Secretary. Instead Congress has provided a clear and explicit standard, delegating to the Secretary power to create the machinery for effectuating that policy. To require anything further would, in the words of the Supreme Court, give rise to "the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

United States v. *Cohen Grocery Co.,* 255 U. S. 81; and *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, cited by appellees on pages 92–93 of their brief, are not in point. These cases involved criminal prosecutions for violations of statutes which contained no ascertainable standard of guilt. They have no bearing on the question of delegation of power. *There are no penalties in the Act for the violation of Licenses, but only for continuance in business* after revocation of the right to engage in

business under a License specific and explicit in its terms.

For the foregoing reasons we submit that section 8 (3) of the Agricultural Adjustment Act is a valid delegation of power to the Secretary of Agriculture.

One further point in the *Panama* and *Amazon* cases may be considered briefly. The Court held that even though Section 9 (c) were an appropriate delegation of legislative power, the Executive Orders issued by the President pursuant to that section of the Act were invalid because they failed to contain presidential findings of the existence of the required bases of his action. Findings of the character which the Supreme Court indicated were prerequisites of executive action have been made by the Secretary of Agriculture in the case at bar. In the marketing agreement which was executed by the Secretary pursuant to section 8 (2) of the Act contemporaneously with License No. 17 and which contains provisions substantially identical with those prescribed in that License, the Secretary specifically found that the marketing agreement would tend to effectuate the declared policy of the Act, and that the terms and conditions thereof were reasonable in the light of conditions then prevailing in the Los Angeles Sales Area. (Page 11 of marketing agreement, following R. 32.) License No. 17 itself contains a similar specific finding in the following words (License Page 47 following R. 32):

> WHEREAS, pursuant to said act and to said regulations, the Secretary has determined that it is necessary to issue licenses in order to eliminate unfair practices or charges that prevent or tend to prevent (1) the effectuation of the declared policy of said act with respect to milk and its products, and (2) the restoration of normal economic conditions in the marketing of such commodity and the financing thereof; * * *.

Thus it clearly appears that the Secretary of Agriculture has expressly found that the Los Angeles Milk Licenses comply with the mandate of the Act in that they are designed and do effectuate the declared policy of the Act.

V

Section 8 (3) of the Agricultural Adjustment Act does not unconstitutionally confer judicial power upon the Secretary of Agriculture

Appellees allege on pages 102–106 of their brief that the Secretary, in conducting an administrative hearing and revoking a license, exercises judicial power contrary to the provisions of Section 1, Article III, of the Constitution. Administrative proceedings, such as those contemplated by the Act and prescribed by General Regulations, Series 3, have long been recognized as constitutionally valid. The power granted to the Secretary to revoke licenses after an administrative hearing is similar to the powers granted to executive officers in other Departments of the Federal and State Govern-

ments, and to such administrative tribunals as the Interstate Commerce Commission, the Board of Tax Appeals, the Federal Trade Commission, and many others. See *Nishimura Ekiu* v. *United States,* 142 U. S. 651; *Tagg Bros.* v. *United States,* 280 U. S. 420; *Crowell* v. *Benson,* 285 U. S. 22. These are but a few of the many cases involving statutes giving administrative officials the right to act as prosecutor, witness, judge, and jury in determining questions of fact and law which immediately affect the liberty of persons and property.

Section 8 (3) of the Act provides that revocation shall be final by the Secretary "if in accordance with law." This language is a clear invitation to any licensee to have an order revoking his license reviewed in the courts. Since the right to have orders of the Secretary reviewed by the courts is not denied to licensees, the administrative proceeding contemplated by the Act is clearly constitutional. See *Louisville and Nashville R. Co.* v. *Garrett,* 231 U. S. 298.

VI

Administrative proceedings against appellees under License No. 57 are not an attempt to prosecute appellees under an ex post facto law

Article II, Paragraph 7 of License No. 57 (R. 123) provides that each distributor shall fulfill any and all of his obligations which have arisen or may arise under License No. 17 which was terminated contemporaneously with the issuance of

License No. 57. Appellees attack this provision as a violation of the constitutional prohibition against ex post facto laws.

A brief analysis of the purpose of this provision will indicate that the contention of appellees is wholly without merit. The termination of License No. 17, without anything further, would have extinguished all obligations which had accrued thereunder and had not theretofore been paid or performed. The provision of License No. 57 here in question is thus no more than a "savings clause" to prevent the extinguishment of these obligations by reason of the termination of the previous license.

The constitutional prohibition against ex post facto laws renders unconstitutional only such laws as attempt to make an act, *innocent when performed, a crime.* It has been the law since *Calder* v. *Bull,* 3 Dall. 386, that this provision of the Constitution applied only to criminal statutes. *Thompson* v. *Utah,* 170 U. S. 343, and *Duncan* v. *State of Missouri,* 152 U. S. 377, cited by appellees, deal with criminal statutes and punishments. In *Johannessen* v. *United States,* 225 U. S. 227, the Court said, with regard to this provision of the Constitution:

> It is, however, settled that this prohibition is confined to the law respecting criminal punishments, and has no relation to retrospective legislation of any other description.

There are no criminal penalties either in the Agricultural Adjustment Act or in the Licenses issued thereunder for the failure of a distributor to fulfill the obligations imposed upon him by a License. Under neither is the violation of a License a criminal offense.

Further, even if the violations of the Licenses were criminal offenses, this provision of the License would not be unconstitutional as an ex post facto law, because it would not attach criminality to acts which were innocent when done. This paragraph of the License simply provides for fulfillment of obligations *already incurred* and which continue under License No. 57. Such a provision even in a criminal statute would not be invalid. See *Samuels* v. *McCurdy,* 267 U. S. 188.

VII

The Licenses are valid regulations of interstate commerce

Appellees argue strenuously in their brief, pages 23 to 64, that the Licenses are beyond the power of the Federal government. Briefly their reasons are (1) none of the milk produced and/or distributed by them is produced and/or distributed outside of the State of California, (2) the terms and conditions of the Licenses have reference only to local and intrastate transactions.

We admit that the business of the appellees is in itself purely intrastate in character. But it is our position that the Federal Government has power

under the Commerce Clause to regulate the business of distributing fluid milk in the Los Angeles Sales Area because practices in the distribution of such milk exist in the Los Angeles Milk Market which directly burden and affect interstate commerce in dairy products, and that the regulation of the distribution of milk in such intrastate markets as Los Angeles is essential to the raising of the prices received by farmers for the milk which is converted into those dairy products.

The fact that the Licenses regulate local transactions does not render such regulation invalid. We have shown in our original brief, pages 49 to 59, many instances in which the United States Supreme Court has upheld Federal regulation of intrastate transactions because of their effect upon interstate commerce. Once more we wish to call attention to the case of *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, analyzed and discussed on pages 49 to 53 of our original brief, in which Federal regulation of intrastate grain futures contracts (rarely resulting in actual delivery of the commodity) were upheld because of their effect upon the price paid for cash grain which actually moves in interstate commerce.

With the exception of *Hammer* v. *Dagenhart,* 247 U. S. 251; and *Howard* v. *Illinois C. R. Co.,* 207 U. S. 463, every United States Supreme Court case cited by appellees in support of their position is one involving the constitutionality of State and

not Federal statutes. We again respectfully submit that in upholding the power of the State in these cases the Supreme Court did not decide that Congress lacked such power. (See pages 60–64 of our original brief.) In *Hammer* v. *Dagenhart, supra,* there was no showing that child labor affected interstate commerce. In *Howard* v. *Illinois C. R. Co., supra,* the first Federal Employers Liability Act was held invalid because *in terms it was applicable alike to persons engaged in both interstate and intrastate commerce.* Under the second Federal Employers Liability Act, upheld in *Mondou* v. *N. Y., N. H. & H. R. R.,* 223 U. S. 1, there are innumerable instances in which the Supreme Court has sustained its applicability to employees engaged in intrastate activities which affect or are associated with interstate commerce.

The Licenses involved in this case are *units of a comprehensive nation-wide plan* (R. 318) being put into effect by the Secretary of Agriculture pursuant to the powers vested in him by the Act for the purpose of restoring the purchasing power of farmers to its pre-war level. There are at present over fifty of these Federal Milk Licenses in effect in important fluid milk sales areas throughout the country. We have already shown that regulation by means of the License involved here, is essential because of the burden on interstate commerce in dairy products caused by competitive practices in the distribution of fluid milk in the Los Angeles Sales Area. But above and beyond this basis for

Federal power, regulation by means of these Licenses is justifiable under the Act and under previous decisions of the United States Supreme Court because of the effect upon interstate commerce in industrial products brought about by these same competitive practices. We have shown (R. 315, 316, 320, 321) the wide disparity which exists between the price received by producers of milk supplying the Los Angeles Sales Area and the price paid by them for commodities purchased. Agriculture is an industry of tremendous size and of paramount importance, almost one-fourth of which constitutes dairy farming (R. 319). It is perfectly obvious that unless the purchasing power of farmers is increased, interstate commerce in industrial products will be impeded and the industrial recovery of the nation will be hindered.

While transactions in the distribution of milk in the Los Angeles Sales Area may have only a slight effect upon interstate commerce during normal times, they have a decided and an important effect upon interstate commerce in the present economic emergency. The License supplies a marketing plan which stabilizes the fluid milk market in the Los Angeles Sales Area and eliminates one of its most vexing problems by providing for an equitable allocation of the necessary surplus of fluid milk. Destructive trade practices and ruinous competition in the efforts to dispose of this surplus milk, which brought about demoralization of

the Los Angeles and many other milk markets and consequently lowered prices to producers, have been checked by the License.

Appellees in their brief on page 67 have committed a fatal blunder in attempting to distinguish the Anti-Trust cases cited in our brief. *They confuse the economic policy of the Anti-Trust Act with the law of the cases.* In the Anti-Trust Act Congress found that the interests of the nation would best be served by encouraging competition and exercised its power under the Commerce Clause for this purpose. In enacting the Agricultural Adjustment Act Congress found that unbridled competition was undesirable and that cooperation in the agricultural industries would best serve the welfare of agriculture and of the nation. *The question of economic policy is not for the courts to pass upon.* In the very case cited by appellees on page 67 of their brief, *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337 the Supreme Court said:

> Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court granting the temporary injunction should be reversed

and the cause remanded with directions to dismiss the bill of complaint.

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No. 7657

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY W. BERDIE, et al.,
Appellants,

vs.

CHARLES J. KURTZ, et al.,
Appellees.

Appeal From the District Court of the United States,
Southern District of California,
Central Division

Petition for Rehearing

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SUBJECT INDEX

CITATIONS AND AUTHORITIES

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY W. BERDIE, et al.,
Appellants,

vs.

CHARLES J. KURTZ, et al.,
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Petition for Rehearing

COME NOW the appellants and move that the order affirming the decree of the lower court for a temporary injunction entered herein, on or about March 4, 1935, be vacated and set aside and that a rehearing of this cause be granted on the following grounds:

I. With respect to the interstate commerce feature of this case, the majority opinion of the court has quite clearly and fairly stated the position of appellants. (See majority opinion, pp. 9 and 10). Briefly stated, appellants' position is that the facts shown by the record clearly disclose that the intrastate activities of Los Angeles milk distributors are in the current of interstate commerce and burden, obstruct and affect interstate commerce, and hence are subject to Federal regulation.

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I. With respect to the interstate commerce feature of this case, the majority opinion of the court has quite clearly and fairly stated the position of appellants. (See majority opinion, pp. 9 and 10). Briefly stated, appellants' position is that the facts shown by the record clearly disclose that the intrastate activities of Los Angeles milk distributors are in the current of interstate commerce and burden, obstruct and affect interstate commerce, and hence are subject to Federal regulation.

The majority opinion, while clearly and fairly stating appellants' position in this respect, does not decide or express any opinion on the question whether such facts constitute an affecting, burdening, or obstructing of interstate commerce, so as to justify Federal regulation; instead, the majority opinion holds that regardless of the effect of intrastate activities upon interstate commerce in milk and milk products, the language of Section 8(3) of the Agricultural Adjustment Act indicates that Congress did not intend to exercise any authority over such transactions.

The majority opinion holds the Los Angeles Milk License to be void solely upon its construction of the phrase "in the current of interstate commerce" as used in Section 8(3). In view of the facts (1) that the majority opinion has carefully refrained from holding that the facts disclosed in this record do not constitute an affecting, burdening, or obstructing of interstate commerce, and (2) that the dissenting opinion squarely holds that such facts justify the Federal regulation of milk by the Los Angeles Milk License, and (3) in view of the importance to the Government of the question of statutory construction passed upon by the majority opinion, appellants are filing this petition for rehearing which is addressed to the question of statutory construction *which was not* raised or discussed by any of the parties in their briefs, and, to the proposition—

II. That the court was under a misapprehension in determining that the appellees were entitled to equitable relief in that appellees did not allege or prove that they would be damaged irreparably, or otherwise, by relying on their legal defenses, and to the proposition that—

III. The court was under a misapprehension in sustaining the injunction against the maintenance of a state court action in that no showing was made that the state court action for money in any manner interfered with the jurisdiction of the federal court in the injunction procedure.

I.

The Precise Holding of the Majority Opinion in Regard to the Phrase "In the Current of Interstate or Foreign Commerce."

In reference to interstate commerce, briefly stated, the majority opinion holds:

1. That the phrase "in the current of interstate or foreign commerce" as used in Section 8 (3) "is restrictive rather than expansive in its effect" (majority opinion, page 12, last paragraph).

2. That the amendment of Section 8 (2) on April 7, 1934, by the addition of the words "or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce" indicates the intention of Congress to expand the scope of sub-section 2 beyond that of sub-section 3, which was not similarly amended.

We do not understand the majority opinion to hold that if the phrase "in the current of interstate commerce" as originally used in both sub-sections (2) and (3) was sufficiently broad and comprehensive to include transactions which affect, burden, or obstruct, interstate commerce, then the effect of amending 8 (2) without similarly amending 8 (3) was, as a matter of law, to change and modify the meaning of the phrase "in the current of interstate commerce" as used in Section 8 (3).

In this petition, therefore, we shall respectfully contend that the majority opinion was in error in its construction of Section 8 (3) in limiting the meaning of "in the current of interstate commerce" in such a fashion as to exclude those activities which affect, burden, and obstruct interstate commerce.

A.

The Origin and Meaning of the Phrase "In the Current of Interstate Commerce" as Shown by the Decisions of the Supreme Court of the United States.

The choice of the phrase "in the current of interstate commerce" in Section 8 as originally enacted was not a haphazard one. Had Congress originally intended, as the majority of this court has held, to restrict the scope of sub-sections 2 and 3 of Section 8 to transactions themselves in interstate commerce, Congress could readily have said so. The phrase "current of interstate commerce" would not then have been used and both sub-section 2 and sub-section (3) would have been concerned with the handling of agricultural commodities "in interstate commerce."

Congress did not use the language which it would naturally have used had its intention been as the majority of this court has construed it to be. Instead, it used a phrase which, by prior legislative usage and by decision, had come to have a broader meaning. The phrase "current of commerce" originated in the decision of the Supreme Court in *Swift & Co. v. United States*, 196 U. S. 375, where the court said (pages 398 and

399), in answer to the objection that the purchase and sale of cattle in the stockyards in Chicago did not constitute interstate commerce because the transactions occurred within the border of a single state:

> "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce."

The court conceived of the continuous movement of cattle from the plains of the West and Southwest through the packing plants to the consumption centers in the East as a current of commerce among the several states and held that the intrastate character of individual transactions occurring in the movement did not place them beyond the power of national regulation.

The phrase used by the Supreme Court in the *Swift* case, to express its intention to subject intrastate transactions to Federal control, was adopted by Congress in formulating the Packers and Stockyards Act of 1921. After defining the term "commerce" as used in that Act, Congress further stated in Section 2 (b) that "a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the livestock and meat-packing indus-

tries * * * ." The purpose of Congress was clear. It intended to include within the scope of the Act transactions occurring in the movement of the commodity which, considered by themselves and apart from the constant interstate movement, were intrastate in character; and to carry out its intentions, Congress adopted a phrase of known content, "current of commerce." The validity of the Packers and Stockyards Act of 1921 was challenged in *Stafford v. Wallace*, 258 U. S. 495, upon the ground that the purchases and sales of cattle in the stockyards in Chicago occurred within the boundaries of a single state and so were beyond congressional power. The court recognized that by the use of the phrase "current of commerce" Congress had appropriately expressed its intention to bring intrastate transactions under Federal control, and the validity of the Act was sustained. The court said (p. 520):

> "It is manifest that Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the Swift case. The recital in Section 2 (b) of title 1 of the Act quoted in the margin leaves no doubt of this. The Act deals with the same current of business, and the same practical conception of interstate commerce."

Again, when Congress sought to impose upon the boards of trade throughout the country a national system of regulation in the Grain Futures Act of 1922, it adopted the same technique. After defining the phrase "interstate commerce" as used in the Act, it added to the definition Section 2 (b) which provided that "a trans-

action with respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade * * * ." The validity of the Act was challenged in *Chicago Board of Trade v. Olsen,* 262 U. S. 1, upon the ground that the impact of the regulation was upon transactions in grain futures which had theretofore been held not to be interstate commerce. (*Hill v. Wallace,* 259 U. S. 44.) In *Hill v. Wallace,* the court had said (p. 69):

> "It follows that sales for future delivery on the Board of Trade are not, in and of themselves, interstate commerce. They cannot come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon."

In the Grain Futures Act of 1922, which was before the court in the *Olsen* case, Congress had manifested its intention to subject to Federal control intrastate transactions in sales for future delivery by the use of the phrase "current of commerce." The validity of the Act and the aptness of the phrase "current of commerce" to describe transactions "directly interfering with interstate commerce so as to be an obstruction or a burden thereon" were sustained by the Supreme Court.

The declaration of emergency and the declaration of policy quoted in our original brief), which preface the Agricultural Adjustment Act indicate clearly that Congress intended by the Act to alleviate the economic crisis in agriculture, by increasing the purchasing power of the American farmer. The declaration of emergency con-

tains a finding by Congress that the prevailing critical conditions in the basic industry of agriculture "have affected transactions in agricultural commodities *with a national public interest* * * * and render imperative the immediate enactment of Title I of this Act." The powers which Congress vested in the Secretary of Agriculture to accomplish the important purposes of the Act are broad and comprehensive. It is clear that Congress intended to exercise to the full the powers vested in it by the Constitution in order to alleviate the economic crisis "more serious than ever." It would be a strained construction of the Act which would permit the Secretary of Agriculture under Section 8 (3) to increase the purchasing power of only that portion of each agricultural commodity which physically moves in interstate commerce. That Congress did not intend that Section 8 (3) should be so restrictively interpreted is further borne out by a consideration of its legislative history.

B.

The Legislative History of the Amendment to Section 8(2) and the Proposed Amendment to Section 8(3).

Section 8(2) of the Act was amended on April 7, 1934, by the addition of the words, *"or in competition with, or so as to burden, obstruct, or in any way affect,* interstate or foreign commerce." Section 8(3) was not similarly amended. Concerning the effect of the amendment to Section 8 (2), the prevailing opinions states: "This difference in language marks a definite change of thought." The minority opinion does not adopt this view, but holds

that Congress intended to and did subject to national regulation intrastate transactions such as those involved in the case at bar.

In such a situation, where there is doubt as to the intention of the legislative body, it is settled that resort will be had to the legislative history of the bill, and particularly to the reports of committees of Congress, in order to determine the legislative intent.

Church of the Holy Trinity v. United States, 143 U. S. 447;

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 474;

Binns v. United States, 194 U. S. 486, 495;

N. Y. C. R. Co. v. Winfield, 244 U. S. 147, 150;

Whitney v. United States, (C. C. A. 9), 8 Fed. (2d) 476, 478;

Jordan v. United States (C. C. A. 9), 36 Fed. (2d) 43;

Ng Fung Ho v. White, (C. C. A. 9), 266 Fed. 765.

The bill to amend Section 8(2) of the Act originated in the House of Representatives, was passed by that body, and after amendment was passed by the Senate. The House refused to concur in the Senate amendments and the Senate refused to recede from its amendments. Conference committees were appointed.

Th report of the House Conference Committee explains the purpose of the Senate amendments. (Senate Conference Committee Reports are not printed). Concerning the effect of the amendment here involved, which originated in the Senate, the House Conference Committee on March 26, 1934 made the following statement in its

report to the House (73d Congress, 2nd Session, House Report No. 1051, p. 4):

> "Amendment No. 6: This amendment amends the provision of the Agricultural Adjustment Act which authorizes the Secretary of Agriculture to enter into marketing agreements. It broadens the class of parties with whom agreements can be made to include producers, *and clarifies the provision so that express authorization is given to enter into agreements with parties handling agricultural commodities and products in competition with or affecting interstate or foreign commerce.*" (Italics ours).

The intention of Congress is plain. It was *not* to *expand* the scope of the original provision, but rather to clarify the language and to state *expressly* what had always been the legislative intent.

A bill amending Section 8(3) of the Act so that the scope of the delegated power with respect to marketing agreements and licenses would be expressed in identical language was introduced in the Senate during the second session of the 73d Congress. This bill was introduced on March 28, after the Conference Report on the amendment to Section 8(2) was approved by the House, and the day before it was approved by the Senate. The proposed amendment to Section 8(3) authorized the Secretary—

> "(I) To prohibit processors, distributors (including producers and associations of producers, who are processors or distributors) and others from engaging in the handling of any agricultural commodity or product thereof, or any competing commodity or product thereof, in the current of or in

> competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce without a license, and (II) to issue licenses to permit processors * * * to engage in such handling * * *."

This bill, introduced late in the session, was not enacted and *was never submitted to a vote in either House.* It was introduced only in the Senate and was considered by the Senate Committee on Agriculture which reported the bill out of committee with the recommendation that it do pass. Concerning the effect of this proposed amendment, the report of the Senate Committee on Agriculture stated (73d Congress, 2d Session, Senate Report No. 1120, p. 2):

> "The first paragraph, lettered (A), follows the language of the first two sentences of section 8(3) of the present act, except in the following respects: (a) It *states clearly* the implied power the Secretary *has under the present licensing provision* to prohibit those who have no licenses, when licenses are required, from engaging in the handling of agricultural commodities *so as to affect interstate or foreign commerce.*" (Italics ours).

This report indicates beyond doubt (a) that Congress considered the existing language of sub-section (3) adequate to express its intention to exercise its control over those transactions which affect, obstruct or burden interstate commerce, and (b) that Congress considered that the addition of the words emphasized by the majority opinion of this court would effect no change of meaning, but would merely clarify the statement of powers already granted.

The statement of District Judge Baltzell in the opinion in *United States v. Greenwood Dairy Farms, Inc.*, 8 Fed. Supp. 398 that this proposed amendment "failed of passage" is inaccurate. The term "failed of passage" is properly applied when a bill is submitted to a vote upon the question of whether or not it shall pass, and fails to secure the requisite number of votes. This bill was never submitted to any vote. As District Judge Chestnut pointed out in his opinion in *Royal Farms Dairy, Inc. v. Wallace*, 8 Fed. Supp. 975, the amendment had apparently "never been brought to a vote in Congress."

To summarize:

(1) The report of the House Conference Committee on the amendment to Section 8(2) shows that the amendment was intended only to clarify the language of this section and was not intended *to broaden* the scope of its operation.

(2) The Senate Committee Report upon the proposed amendment to Section 8(3) shows that Congress considered the existing language of Section 8(3) sufficiently broad to include intrastate transactions, and that the addition of the words inserted by amendment in Section 8(2) would not alter the scope of the section but would merely state clearly the power *already conferred* upon the Secretary of Agriculture.

II.

The Appellees Are Not Entitled to Equitable Relief

The only reference in the opinion to the cause for equity intervening is that the "actions of the appellant constitute trespass." This statement is evidently under a

misapprehension of the facts appearing in the record in this case.

The court in the majority opinion further states that the only thing the appellees are seeking to establish is "their right to conduct their business under the constitutional guarantee of freedom under the right of contract." It is shown by the record and recognized as a fact by the majority opinion that the appellees voluntarily ceased to do business. It is submitted that no trespass can be effected upon any person's rights or against any persons if they voluntarily cease to operate. Trespass comprehends injury or the ability to inflict injury, and certainly no injury can be inflicted upon any person who is not in a position to be injured, such as appellees in this case who voluntarily quit business. None of the appellants had any dealings with the appellees since they had ceased to do business. As to any punishment or legal action that might be taken against them for any alleged violation of the act, the appellant Peirson M. Hall is the only one who could have become active in enforcing the law and there was no showing that he had threatened to do so or that he had been requested to do so by the Secretary of Agriculture or the Attorney General, without which previous request as appears from the face of the Agricultural Adjustment Act he was without any power or authority. (Sec. 8 (E), (7) *Agr. Adj. Act.*)

The only action as against appellees reflected in the entire record is the demand of the officials who had been in charge of License No. 17 that such appellees pay to such officials and account for such monies as they had collected and were holding under and

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The only action as against appellees reflected in the entire record is the demand of the officials who had been in charge of License No. 17 that such appellees pay to such officials and account for such monies as they had collected and were holding under and

by virtue of said License No. 17, and for which a suit had been brought in the State courts of California. Certainly the enforcement of a right in the court having jurisdiction to adjudicate that right cannot be considered as a trespass. It does not appear from the record that the $52,000 alleged to be in the possession of appellees is the property of the appellees, and appellee's possession of said money should not be protected in a court of conscience. It was the property of the producers of milk which those producers authorized the appellees to retain from money which those producers were entitled to receive and which retention of money by appellees was authorized for one specific purpose, namely, to be used in conformity with the provisions of License No. 17. No authorization by those producers to appellees to bring the instant suit is shown in the record, nor is any consent shown in the record. It is submitted that the action of the appellees in deducting the $52,000 from the producers of milk from whom they bought the milk constituted a contract and created in the hands of appellees a trust fund. The effect of the court's opinion is to enable appellees to hold this money and not to be required to account therefor. Certainly any legal defense appellees might have to an action to account for that money could be fairly asserted in a court of law and did not warrant the interference of a court of equity by injunction. It is thus seen that instead of any injury being threatened to appellees the injury occurs to those who are not before this court, namely, the producers of milk.

Section 3440 of the Civil Code of the State of California is intended to prevent debtors from committing a

fraud upon their creditors by transferring their property without notice. It is shown by the Record (R. 303) that the appellees in the instant matter transferred their assets and property on the 30th day of July, 1934, without compliance with the provisions of said Section 3440 of the Civil Code of the State of California. The appellees having violated the state statutes intended to prevent fraud are in a position of coming into a court of equity and securing an injunction to protect them in that conduct.

III.

The State Court Action for Money is Not an Evasion of the Prior Jurisdiction of the Federal Court

The majority opinion dismisses the injunction of the state court actions by the mere statement that Section 379 of Title 28, U. S. C. A., has no application where the jurisdiction of the federal court has been invoked previous to the action of the state court. This is either a misapprehension of the facts involved in this case or of the law applicable thereto. The Record shows that the federal court action was filed January 11, 1934 (R. 48). No injunction was granted on that bill. Appellants Milk Producers, Inc., on the 19th day of July, 1934, filed an action in the Superior Court of the State of California in and for the County of Los Angeles, against appellees Lucerne Cream and Butter Company and Safeway Stores, Inc., for the recovery of $18,454.01 (being a portion of the $52,000 alleged to be held by all appellees) *and at that time no judgment had been obtained and no injunction was in force in the federal court in the within action or any action between the*

parties. The Supplemental Bill of Complaint was filed September 4, 1934 (R. 234). The entire cause of action is stated in the supplemental bill and only seeks to enjoin the defendants therein (appellants here) from enforcing the Milk Licenses. The within action is strictly an action *in personam* as distinguished from an action *in rem* and the court did not in any manner assert any jurisdiction of the *property* of any of the parties to the suit. The state court action, as alleged in the Supplemental Bill of Complaint, and as set out in the evidence (R. 300) was only for the *recovery of money* which it was alleged appellees had in their possession by virtue of the Milk License and which did not belong to them. All demands for money from appellants, amounting to the sum of $52,000 (R. 303) was of the same nature. In the state court actions, no effort was made to take possession of the property of the parties nor did the state court in any manner assert any jurisdiction which was in the least in conflict with the injunction action pending in the District Court. Under such conditions even though the subject matter is the same, the state court and the federal court actions may be maintained at the same time and the federal court cannot enjoin the state court action. That such is the law was definitely decided by the Supreme Court of the United States on the 4th day of February, 1935, in the case of *Pennsylvania General Casualty Company vs. Commonwealth of Pennsylvania,* being case No. 431—October Term, 1934, ... U. S. ..... In that case Mr. Justice Stone writing the opinion for the court said:

> (p. 4) "Where the judgment sought is strictly *in personam*, for the recovery of money or for an

> injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res adjudicata in the other."

That case seems to fully determine the matter that the state court actions should not have been enjoined in this case.

Conclusion

The foregoing legislative history was not before this court when its opinion was rendered. In view of this legislative history, we earnestly contend that the majority opinion was in error in holding that the amendment to Section 8 (2) of the Agricultural Adjustment Act marks "a definite change of thought." This question of statutory interpretation, here presented, is one of great importance to the Government, and the decision of this question will have very important practical consequences.

Apart from this question of statutory construction, the dissenting opinion in this case has squarely held that the economic facts, disclosed by this record, justify the Federal regulation of milk as contained in the Los Angeles Milk License.

It is earnestly requested that this court grant a petition for rehearing on the three above mentioned questions and upon such hearing hold that the Federal regulation contained in the Los Angeles Milk License

is lawfully justified and that the decision of the lower court should be reversed.

HAROLD M. STEPHENS,
Assistant Attorney General,

PEIRSON M. HALL,
United States Attorney,

CLYDE THOMAS,
Assistant U. S. Attorney,

CARL MCFARLAND,
MAC ASBILL,
A. H. FELLER,
Special Assistants to the Attorney General.

SETH THOMAS,
Solicitor,
Department of Agriculture.

ARTHUR C. BACHRACH,
JOHN J. ABT,
DONALD C. MACGUINEAS,
M. CAMPER O'NEAL,
Attorneys,
Agricultural Adjustment Administration.

Attorneys for Appellants.

CERTIFICATE

I hereby certify that the foregoing petition is, in my opinion, well founded in law and should be granted and is not interposed for delay.

PEIRSON M. HALL,
United States Attorney.

No. 7674

United States

Circuit Court of Appeals

For the Ninth Circuit.

WONG YING WING,

Appellant,

vs.

MARIE A. PROCTOR, United States Commissoner of Immigration at the Port of Seattle,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL.

MR. EDWARD H. CHAVELLE,
Attorney for Appellant,
315 Lyon Building, Seattle, Washington.

MESSRS. J. CHARLES DENNIS and
JOHN AMBLER,
Attorneys for Appellee,
222 Post Office Building,
Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20894

In the Matter of the Application of
WONG YING WING
For a Writ of Habeas Corpus.

PETIION FOR WRIT OF HABEAS CORPUS

To the Honorable Judge of the above Court:

Comes now your petitioner and files this his petition for writ of habeas corpus, and respectfully represents and shows:

I.

That your petitioner was born in the United States, and is the son of Wong Hung Gee and Lim

*Page numbering appearing at the foot of page of original certified Transcript of Record.

Shee; that he was born at No. 16½ Waverly Place, San Francisco, California; that his blood brother, Wong Moon Fay, is a resident of Minneapolis, Minnesota, and has previously identified your petitioner in his various applications for determination of status and for permission to leave the United States and for reentry into the United States, as have the parents of petitioner; and that all of the evidence and testimony proves the status of your petitioner as a citizen.

II.

That, having been born in the United States, your petitioner did not leave the same until January, 1932, when he left for China, through the port of Seattle; that your petitioner was examined at Minneapolis, Minnesota, and subsequently arrived in Seattle from China May 29th, 1934, and then and there applied [2] to the Commissioner of Immigration and Naturalization at the Port of Seattle for admission as a citizen of the United States; and thereupon and thereafter, at a hearing on said application before said Commissioner and before a Board of Special Inquiry convened under the law by said Commissioner to pass upon said application and find and determine the truth thereunder, there was then and there presented to and taken by said Board testimony and evidence tending to show and showing the citizenship of your petitioner and his right to admission to the United States as said citizen.

III.

That, notwithstanding the facts as hereinabove set forth and the testimony presented to the Board of Special Inquiry, establishing the United States citizenship of your petitioner as aforesaid, and notwithstanding that said evidence and testimony before said Board stood and now stands uncontroverted by any material testimony, said Board and said Commissioner of Immigration and Naturalization did, on or about July 13th, 1934, refuse to admit your petitioner into the United States, and made its order that he be rejected and deported to the Republic of China, said order of rejection and deportation being made without any material evidence to support it and being based wholly and solely upon the ground and premises of alleged discrepancies between the testimony of your petitioner and the witnesses produced on his behalf, and on hearsay testimony only, and on theory and speculation—having no foundation or support in the record or the testimony in this proceeding and in the face of and contrary to the convincing evidence in the record of the citizenship of the father of your petitioner and of the relationship claimed by the said Wong Moon Fay for your petitioner. That the commission did not believe that your petitioner and Wong Moon Fay [3] could be blood brothers—this finding being based upon the conclusion that if Wong Ying Wing and Wong Moon Fay were blood brothers they would have kept in closer touch with each other than was indicated

by the record, and because Wong Ying Wing did not visit his said brother Wong Moon Fay in a number of years, from San Francisco to Minneapolis; and upon the further conjecture and conclusion that your petitioner went to Minneapolis from San Francisco to take the testimony of his brother in support of his application for permission to leave the United States, and on hearsay testimony only—this theory and speculation having no foundation or support in the record or the testimony in this proceeding, and being in the face of and contrary to the convincing evidence in the record of the citizenship of your petitioner and of the relationship claimed by your petitioner to his brother Wong Moon Fay and to his father and mother Wong Hung Gee and Lim Shee.

IV.

That thereupon and thereafter, on appeal from said order of rejection and deportation to the Honorable Secretary of Labor, said order was by her on or about the 12th day of August, 1934 affirmed and said appeal dismissed, all with the full knowledge on the part of said Commissioner and Board at the Port of Seattle and said Secretary of Labor of the proofs of citizenship and parentage so taken and filed in the proceeding as aforesaid—their action being so taken arbitrarily, capriciously, wrongfully and unfairly, against the interest and rights of your petitioner.

V.

That, notwithstanding the facts as above set forth, said Wong Ying Wing is now detained, imprisoned,

confined and restrained of his liberty by the Honorable Marie A. Proctor, [4] United States Commissioner of Immigration and Naturalization at the Port of Seattle, at and in the Immigration Station in the city of Seattle, county of King, State of Washington, in the district aforesaid, and within the jurisdiction of this court, said detention, imprisonment, confinement and restraint being for the pretended and supposed reason that, notwithstanding the facts as hereinbefore set forth, said Wong Ying Wing is not entitled to admission into the United States.

VI.

That the said detention, imprisonment, confinement and restraint of the said Wong Ying Wing is not upon or under any process issued by any final judgment of a court of competent jurisdiction, nor for contempt of any court officer or body having authority in the premises to commit, nor upon any warrant issued from this court, nor from any court upon any indictment or information.

VII.

That your petitioner has deposited with the Commissioner of Immigration and Naturalization at Seattle and the Department of Labor the sum of one hundred dollars ($100.00) as maintenance charges and expenses of your petitioner pending this proceeding.

WHEREFORE, your petitioner prays that an order be issued herein, ordering and commanding

the said Honorable Marie A. Proctor, as Commissioner aforesaid to appear in this court on the 24th day of September, 1934 at 10:00 o'clock a. m., and show cause why a writ of habeas corpus should not issue herein; and that, upon said hearing, a writ of habeas corpus issue in due form as [5] provided by law; and that, pending further proceedings herein, said Commissioner of Immigration and Naturalization be enjoined and restrained from deporting your petitioner.

WONG YING WING,
Petitioner.

EDWARD H. CHAVELLE,
Attorney for Petitioner.

State of Washington,
County of King.—ss.

WONG YING WING, being first duly sworn, on oath deposes and says: That he is the above named petitioner; that he has heard the said petition read, knows the contents thereof and that the same is true and correct.

WONG YING WING

Subscribed and sworn to before me this 17th day of August, 1934.

[Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Aug. 17, 1934. [6]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE.

To the Honorable John C. Bowen, Judge of the District Court of the United States for the Western District of Washington:

Comes now the respondent, MARIE A. PROCTOR, United States Commissioner of Immigration and Naturalization at the Port of Seattle, Washington, and, for answer and return to the order to show cause entered herein, certifies that the said WONG YING WING was detained by this respondent at the time he arrived at the port of Seattle, Washington, to wit: May 29, 1934, as an alien Chinese person not entitled to admission into the United States under the laws of the United States, pending a decision on his application for admission as a native-born citizen of this country; that, at a hearing before a Board of Special Inquiry at the Seattle Immigration Office, the said WONG YING WING was unable to furnish satisfactory proof that he was born in the United States and his application for admission into the United States was denied for that reason, and on the ground that he was coming to the United States in violation of Section 13 (c) of the Immigration Act of 1924 and that he was not in possession of an unexpired Immigration Visa as is required by the Immigration Act of 1924; that the said WONG YING WING appealed from this decision of the Board of Special Inquiry to the Secretary of Labor and thereafter the decision of the Board of Special Inquiry was affirmed by the Secre-

tary of Labor and the said WONG YING WING was ordered deported to China; that, since the final decision of the Secretary of Labor, respondent has held, and now holds and detains, the said WONG YING WING for deportation from the United States as an alien person not entitled to admission into the United States under the laws of the United States, and subject to deportation under the laws of the United States.

The original record of the Department of Labor, including all exhibits, both on the hearing before the Board of Special Inquiry at Seattle, Washington, and on the submission of the record on the appeal to the Secretary of Labor at Washington, D. C., in the matter of the [7] application of WONG YING WING for admission into the United States, is hereto attached and made a part and parcel of this return, as fully and completely as though set forth herein in detail.

WHEREFORE, respondent prays that the petition for a Writ of Habeas Corpus be denied.

MARIE A. PROCTOR

United States of America,
Western District of Washington,
Northern Division.—ss.

MARIE A. PROCTOR, being first duly sworn, on oath deposes and says: That she is United States Commissioner of Immigration and Naturalization at the port of Seattle, Washington, and the respondent named in the foregoing return; that she has

read the foregoing return, knows the contents thereof and believes the same to be true.

MARIE A. PROCTOR

Subscribed and sworn to before me this 19th day of September, 1934.

[Seal] D. L. YOUNG,

Notary Public in and for the State of Washington, residing at Seattle.

Received a copy of the within Return this 21 day of Sept. 1934.

EDWARD H. CHAVELLE.
Attorney for Petitioner.

[Endorsed]: Filed Sep. 21, 1934. [8]

[Title of Court and Cause.]

HEARING.

Now on this 15th day of October, 1934, Gerald Shucklin, Assistant United States District Attorney, appearing, this matter having been heard heretofore and taken under advisement, and the Court having examined the file and considered the arguments of counsel, now rules from the bench denying the application for a writ of habeas corpus. An order may be prepared.

Journal No. 22, Page 478. [9]

United States District Court, Western District of Washington, Northern Division

No. 20894

In the Matter of the Application of
WONG YING WING
For a Writ of Habeas Corpus.

ORDER DENYING WRIT.

The Commissioner of Immigration having filed his Return to the Order to Show Cause entered herein, and the matter having been submitted to this Court on briefs on the 24th day of September, 1934, on stipulation by and between counsel for the respective parties, and the Court having heretofore rendered oral decision denying the petition, and being fully advised in the premises; NOW, THEREFORE, IT IS BY THIS COURT

ORDERED, ADJUDGED and DECREED that the Writ of Habeas Corpus as prayed for be, and the same is hereby denied; PROVIDED, however, that the petitioner may, within five (5) days, file notice of appeal, and, in the event that appeal be taken, and on condition that the petitioner shall deposit with the said Commissioner of Immigration such sum or sums as may be required for said petitioner's maintenance at the Seattle, Washington, Immigration Station during the pendency of said appeal, deportation shall be stayed pending the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit, or

by the United States Supreme Court should the cause be taken to that court on appeal.

Done in open court this 19th day of October, 1934.

JOHN C. BOWEN
United States District Judge.

O K.

J. CHARLES DENNIS
Attorney for Petitioner

EDWARD H. CHAVELLE.

[Endorsed]: Filed Oct. 19, 1934. [10]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To: Marie A. Proctor, United States Commissioner of Immigration at the Port of Seattle, and J. Charles Dennis, her Attorney:

You, and each of you, are hereby notified that the appellant above named, Wong Ying Wing, hereby and now appeals from that certain order, judgment and decree made herein by the above entitled court on the 19th day of October, 1934, adjudging, holding, finding and decreeing that the above named petitioner be denied a writ of habeas corpus, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

EDWARD H. CHAVELLE
Attorney for Appellant.

Received a copy of the within Notice of Appeal this 19 day of October, 1934.

J. CHARLES DENNIS
Attorney for Appellee.

[Endorsed]: Filed Oct. 19, 1934. [11]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Wong Ying Wing, the appellant above named, deeming himself aggrieved by the order and judgment entered herein on the 19th day of October, 1934, does hereby appeal from the said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript of the record of the proceedings and papers, together with the immigration record in this case, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District of the United States.

EDWARD H. CHAVELLE
Attorney for Appellant

Received a copy of the within petition this 19th day of Octo., 1934.

J. CHARLES DENNIS
Attorney for Appellee.

[Endorsed]: Filed Oct. 19, 1934. [12]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

The court erred in holding and deciding that a writ of habeas corpus should be denied to the petitioner herein, denying him admission to the United States as a citizen thereof.

EDWARD H. CHAVELLE
Attorney for Appellant
By HOWARD W. HEDGCOCK

Received a copy of the within Assignment of Errors this 19th day of October, 1934.

J. CHARLES DENNIS
Attorney for Appellee

[Endorsed]: Filed Oct. 19, 1934. [13]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Now, on, to-wit, this 19th day of October, 1934, it is ordered that the appeal herein be allowed as prayed for; and it is further ordered that the Commissioner of Immigration at the Port of Seattle shall retain custody of said appellant pending appeal and the further orders of this Court and the orders of the United States Circuit Court of Appeals for the Ninth Circuit, the petitioner herein being required to pay his maintenance at the United States Immigration Station while so detained.

Done in open court this 19th day of October, 1934.

JOHN C. BOWEN
United States District Judge

Received a copy of the within Order this 19th day of Oct., 1934.

J. CHARLES DENNIS
Attorney for Appellee

[Endorsed]: Filed Oct. 19, 1934. [14]

[Title of Court and Cause.]

STIPULATION RE TRANSMISSION OF ORIGINAL RECORD AND FILE OF DEPARTMENT OF LABOR.

IT IS HEREBY STIPULATED AND AGREED by and between EDWARD H. CHAVELLE, attorney for petitioner above named, and J. CHARLES DENNIS, attorney for respondent, Marie A. Proctor, United States Commissioner of Immigration, that the original file and record of the Department of Labor covering the proceedings against the petitioner above named may be by the Clerk of this court sent up to the Clerk of the Circuit Court of Appeals, as a part of the appellate record, in order that the said original immigration file may be considered by the Circuit Court of Appeals, in lieu of a certified copy of said record and file, and that said original records may be transmitted as a part of the appellate record.

EDWARD H. CHAVELLE
Attorney for Petitioner
J. CHARLES DENNIS
United States Attorney
JOHN AMBLER
Assistant United States Attorney

[Endorsed]: Filed Oct. 26, 1934. [15]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL RECORD OF DEPARTMENT OF LABOR.

Upon stipulation of counsel, it is by the Court ORDERED, and the Court does hereby ORDER, that the Clerk of the above entitled court transmit with the appellate record in said cause the original file and record of the Department of Labor, covering the deportation proceedings against the petitioner directly to the Clerk of the Circuit Court of Appeals, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record.

Done this 26th day of October, 1934.

JOHN C. BOWEN
United States District Judge

Received a copy of the within Order this 26th day of October, 1934.

J. CHARLES DENNIS
Attorney for Appellee

Presented by
EDWARD H. CHAVELLE
By HOWARD W. HEDGCOCK

[Endorsed] Filed Oct. 26, 1934. [16]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above Entitled Court:

You will please prepare and duly authenticate the transcript and following portions of the record in the above entitled case for appeal of the said appellant, heretofore allowed to the United States Circuit Court of Appeals for the Ninth Circuit.

1. Petition for writ of habeas corpus.
   Return.
2. Decision.
3. Judgment.
4. Petition for appeal.
5. Notice of appeal.
6. Order allowing appeal.
7. Assignment of errors.
8. Citation.
9. Stipulation.
10. Order for transmission of original record.
11. This praecipe.

EDWARD H. CHAVELLE
Attorney for Appellant

Received a copy of the within Praecipe this 26th day of October, 1934.

J. CHARLES DENNIS
Attorney for Appellee

[Endorsed]: Filed Oct. 26, 1934. [17]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Edgar M. Lakin, Clerk of the above entitled Court do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 17, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the Judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit: [18]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 29 folios at 15¢	$ 5.35
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original Department of Labor Records	.50
Total,	$11.35

I hereby certify that the above cost for preparing and certifying record, amounting to $11.35 has been paid to me by the attorney for the appellant.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 7th day of November, 1934.

[Seal] ED. M. LAKIN,

Clerk of the United States District Court for the Western District of Washington.

By TRUMAN EGGER,

Deputy. [19]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America—ss.

To: Honorable Marie A. Proctor, United States Commissioner of Immigration at the Port of Seattle, GREETING:

WHEREAS, Wong Ying Wing has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, order and decree lately, to-wit; on the 19th day of October, 1934, rendered in the District Court of the United States for the Western District of Washington, Northern Division, made in favor of you, adjudging and decreeing that the writ of habeas corpus as prayed for in the petition herein be denied.

You are therefore cited to appear before the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, within the time fixed by statute, to do and receive what may obtain to justice to be done in the premises.

Given under my hand in the City of Seattle, in the Ninth Circuit, this 19th day of October, 1934 and the Independence of the United States the one hundred and fifty-eighth.

JOHN C. BOWEN
United States District Judge.

Received a copy of the within Citation this 19th day of October, 1934.

J. CHARLES DENNIS
Attorney for Appellee

[Endorsed]: Filed Oct. 19, 1934. [20]

[Endorsed]: No. 7674. United States Circuit Court of Appeals for the Ninth Circuit. Wong Ying Wing, Appellant, vs. Marie A. Proctor, United States Commissioner of Immigration at the Port of Seattle, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed November 9, 1934.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7674

In The United States Circuit Court of Appeals

For the Ninth Circuit

WONG YING WING,

Appellant,

vs.

MARIE A. PROCTOR, United States Commissioner of Immigration, at the Port of Seattle,

Appellee.

Brief of Wong Ying Wing, Appellant

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

EDWARD H. CHAVELLE,
Attorney for Appellant.

315-321 Lyon Building,
Seattle, Washington.

GATEWAY PRINTING COMPANY, SEATTLE

No. 7674

In The United States
Circuit Court of Appeals
For the Ninth Circuit

WONG YING WING,

Appellant,

vs.

MARIE A. PROCTOR, United States Commissioner of Immigration, at the Port of Seattle,

Appellee.

Brief of Wong Ying Wing, Appellant

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

STATEMENT OF FACTS

The appellant, Wong Ying Wing, was born as a son of Wong Hung Gwe, his father, and Lim Shee, his mother, in California, where he and his parents lived for many years. As long ago as 1903, the parents appeared before the immigration officials at San Francisco and testified in detail with respect to

their relationship to each other and with regard to their family. At the hearing they claimed a modest family, stating that they were the parents of two boys and one girl, and one boy mentioned by them is identified now as the present applicant. The appellant's brother, whose status as a citizen has been repeatedly recognized by the immigration officials, was the other.

In July, 1930, the appellant wished to leave the United States to visit China. Accordingly, he applied at the Minneapolis office for a citizen's return certificate. The appellant's brother, Wong Mon Fay, appeared for the appellant. His testimony was direct, conclusive and convincing that the appellant was his brother, and, together with the unimpeached testimony of the appellant and favorable evidence found in the prior records, conclusively establishes the status of the appellant as a citizen. The other child, a girl, died in this country in the year of 1917, leaving only the appellant and his brother surviving.

After the hearing had before the immigration officials at Minneapolis, the matter was referred to the Secretary of Labor, and then referred back for a further investigation, to be conducted at Minneapolis to determine the ability of the appellant to

speak English. A further hearing was had on December 3, 1930, and the records were again forwarded to the Department. In the meantime, the appellant having been given a certificate number form 430, presumed that he had a return certificate and left for China. It developed later, however, that form 430 had come into the possession of the appellant through the immigration authorities, and that for some reason unknown to both the appellant and the immigration authorities the form was marked "disapproved," and should not have come into his possession except it had been approved. But he, believing that it was the certificate for which he had made application, proceeded to leave the country, and nothing further was heard from him until March, 1934, when the Seattle immigration office was notified that the appellant was then in China and would apply for admission to the United States at the Port of Seattle.

He arrived on the Steamship President, May 29, 1934, and immediately presented form number 430, believing it was his return certificate. Thereafter a Board of Special Inquiry at Seattle entered a "not satisfied" motion, the issue, of course, whether or not the subject had established birth in the United States. At this hearing direct and uncontroverted evidence was placed before the officials, which estab-

lished appellant's citizenship. There was no evidence whatsoever that would contradict appellant's testimony to the effect that he was a citizen. However, notwithstanding this fact, the Board refused the appellant admission.

In view of the evidence introduced at this hearing, and the manner in which the hearing was conducted, and the manifest unfairness of the Board in disregarding certain substantial testimony without cause or reason, particulars of which will be more fully set out in the argument of this brief, the appellant was denied his birthright, which entitles him to appeal from this finding.

Accordingly, he appealed to the Secretary of Labor, who, upon the recommendation made by the Board of Special Inquiry, sustained the finding, thus entitling the appellant to resort to the courts to establish his citizenship. Accordingly, on the 24th day of September, 1934, a hearing was made before the Honorable John C. Bowen, United States District Court for the Western District of Washington, Northern Division, upon the appellant's writ of habeas corpus, directed to the appellee, in whose custody the appellant was then held, pending deportation in accordance with the finding of the Board.

The appellant comes before this court upon the assignment of error that the District Court erred in holding and deciding that the writ of habeas corpus should be denied to the appellant, and denying him admission to the United States as a citizen thereof.

ARGUMENT

It is a well established rule of law that a person who makes a claim of United States citizenship, and which claim is not frivolous, is entitled to a judicial determination of his status.

Fung Ho. v. White, 259 U. S. 276.

In considering the assignment of errors of the appellant, it will be necessary to consider the more detailed facts, together with the law, according to the numerous acts of the Board of Special Inquiry, which show that the hearing was conducted in a manifestly unfair manner.

All of the Evidence Shows That the Appellant Was a Citizen

In pointing out the substantial evidence which supports the appellant's contention that he is a citizen, let us first consider the testimony of the appellant himself:

Referring now to Exhibit No. 7030/428, the appellant was asked the following questions:

"Q. When and where were you born?

A. 16½ Waverly Place, San Francisco, KS 25/10-9 (Nov. 11, 1899).

. . . .

Q. Can you identify these two photographs? (Exhibiting photos attached to identification affidavit of Lim Shee and Wong Hung Gwe, March 30, 1905, signed before Notary Public Thomas S. Burnes, San Francisco, San Francisco file 21285/2-2, Wong Toy).

A. My father and my mother."

Further substantial testimony which substantiates the appellant's contention that he is a citizen is to be found in the testimony of his brother, Wong Mon Fay, Exhibit No. MPLS. No. 20746:

"Q. Where were you born?

A. In San Francisco, Calif.

Q. At what address in San Francisco were you born?

A. 16½ Waverly Place, San Francisco.

. . . .

Q. I show you Seattle file No. 7030/428 and will ask you if you can identify any of the photographs therein?

A. (Identified photograph attached to Form 430 as that of Wong Ying Wing).

Q. Is this photograph whom you have identified as Wong Ying Wing, the same person that you claim as your brother?

A. Yes.

Q. Where is Wong Ying Wing at the present time?

A. He is at Seattle, Washington.

. . . .

Q. Where was Wong Ying Wing born?

A. He was born at the same address where I was born in San Francisco, 16½ Waverly Place."

In spite of the above and other substantial testimony, the Board of Special Inquiry denied the application of the appellant for the following reason, as shown in the statement by the Chairman:

> "I am not satisfied that Wong Ying Wing was born in the United States as claimed or that his United States citizenship is established."

And further in the memorandum of the Chairman for the information of the Secretary of Labor, he stated:

> "There is no evidence to prove that the applicant Wong Ying Wing was born in San Francisco as claimed nor is there *any evidence* to establish that he is the Wong Ying Wing mentioned by the alleged parents in 1903."

With this direct, positive and unimpeached testimony before it, the Board says that "there is no evidence." Now what does it mean, "no evidence?" There is this positive, direct, unimpeached

testimony. That surely is testimony, which has just been rejected and cut from the record, but without reason. The Chairman of the Board, for the information of the Secretary of Labor, in order that he help the Secretary arrive at a correct conclusion, states there is "no evidence." I do not see how he hopes to benefit by making such a statement. It certainly was not true. It was false and made for the purpose only of misleading the Secretary in arriving at a wrong conclusion, because the Board acted unfairly and arbitrarily in refusing to consider the direct, unimpeached testimony of the appellant and his brother and other witnesses, substantiating and corroborating said testimony. The record itself established that he is the same person mentioned by his parents in the proceedings away back in 1903.

The cases lay down the uniform rule that the testimony of Chinese witnesses is not to be disregarded, and, taking into consideration other surrounding circumstances, the testimony of a Chinese person is to be given the same weight and credibility as that of any other witness.

Kwoch Jan Fat v. White, 253 U. S. 454.

Thus the Board of Special Inquiry was manifestly in error when it disregarded and ignored the

clear and uncontroverted testimony establishing the fact that the appellant was a citizen of the United States, and its ruling is subject to being set aside.

In reviewing the substantial evidence, it should also be borne in mind that, although the Board refused to consider the substantive testimony which establishes the appellant's citizenship, there was absolutely no testimony or evidence introduced to show that appellant was not a citizen. Further, there were no discrepancies or variations in the testimony establishing the citizenship of the appellant. There is no contention in this case that the testimony was manufactured or fabricated. The prior records, and particularly the unquestionable, truthful testimony of the parents as given in 1903, are entirely favorable to the cause of the appellant. The direct and convincing testimony of the appellant and his brother in 1930, and now, is also highly favorable to the cause of the appellant. In addition to the testimonial and record evidence, a most important and conclusive fact is found in the fact that appellant speaks English clearly and well. He was given a test on this particular point in 1930, and made it satisfactorily. The reports then made indicate that appellant showed a good ability to speak and understand the English language. His ability in this respect was made the subject of a special test in 1930,

having been referred by the Secretary of Labor for the purpose only of ascertaining whether or not the appellant spoke and understood English. It appears to me to be an outstanding favorable point.

Resemblance in connection with such an issue as the present one is also important. I am hopeful that the Court will make a careful comparison of the photographs of the members of this family, and particularly that it will compare the photographs of the appellant with the pictures on file of his father and mother and his brother, Wong Moon Fay. I think it will be found that there is a very good resemblance between the applicant and Wong Moon Fay, and a particularly good resemblance, if not a striking one, between the applicant and his father and mother. This resemblance is direct and convincing evidence of relationship between the applicant and his parents and his brother, Wong Moon Fay.

Further evidence favorable to the cause of the applicant is found in the fact that he was able promptly and convincingly to identify record photographs of his father and mother, as well as of his brother, Wong Moon Fay, and of a couple of children of the latter who have been admitted to the United States. Wong Moon Fay, on his part,

promptly and convincingly identified and claimed the applicant.

It is apparent that the appellant, who is a citizen and who was a resident of this country up to 1930, was under some misapprehension as to the decision of the Department. In some manner, which is unexplained by the record, triplicate form number 430, endorsed unfavorably, was delivered to the appellant. He evidently construed this document as attesting his status, and left the United States under the impression that his citizenship had been conceded and that he would be admitted upon return. The only matter that the Department had the appellant's application referred back for was the question of the ability of the appellant to speak the English language. This test he had met, and met well. Of course, it is impossible to tell just where the responsibility for this error lies, but it seems reasonably clear that it does not lie with the applicant, because when he returns to this country the appellant himself presents the certificate number 430, unfavorably endorsed, as evidence of his right to entry to the country. Now, if he had not believed that the document which was given to him, which should never have left the files of the Department, was the document for which he had made application, he would neither have gone to China nor upon

his return have presented evidence which was unfavorable to him. Here it should be borne in mind that as long as the appellant remained here, steps looking to his removal, if the government felt him to be illegally here, could only be taken judicially. In other words, when he lived here, he was entitled to a judicial determination of the question of his citizenship, and I do not believe that he has lost that right by his departure and return.

The United States Supreme Court held in *Ng Fung Ho. v. White,* 259 U. S. 276, that a person who makes a claim of United States citizenship, which claim is not frivolous, is entitled to a judicial determination of his status. Obviously, the claim of citizenship made by this appellant is not frivolous in any respect. It is made in good faith and supported by ample evidence. In consideration of this issue the court should bear in mind the *dicta* of the Supreme Court in *Kwock Jan Fat v. White,* 253 U. S. 454, that it is better that many persons be admitted erroneously than that one United States citizen should be denied his birthright.

In 1930 and in the present proceeding, the appellant and his brother, Wong Moon Fay, were closely and painstakingly questioned. Each of them testified straightforwardly and convincingly, and I

believe that their sworn and unimpeached statements are entitled to full credit and belief. Be it noted here that the officers who examined the brother at Minneapolis, have stated directly that his demeanor throughout the proceedings was good. The applicant also maintained a good demeanor throughout the proceeding in 1930, and also in connection with the present application. No criticism in this respect has been made, and a review of the testimony would seem to show beyond any reasonable doubt that he at all times has testified truthfully and convincingly, to the best of his knowledge, belief and recollection. However, an examination of the record of the Department of Labor will show that the immigration officials deliberately set out to decide adversely to the appellant, in spite of the testimony and the record. This practice of the immigration officials is so prevalent and well known that this court has actually taken judicial notice of the practice.

In the case of *Gung You vs. Nagle, Commissioner of Immigration,* 34 Federal 2nd, 848, the petitioner claimed citizenship as a son of a Chinese citizen. A hearing was had before the Board of Special Inquiry, at which time the only evidence bearing upon the question of the petitioner's citizenship was that offered by the

petitioner and certain of his relatives, which substantially supported the petitioner's claim to citizenship. However, by reason of the fact that a photograph was introduced upon which the petitioner and his brother appeared, and it was discovered that the photograph was a composite photograph, and was not the result of the pictures of the faces of the two Chinese being taken simultaneously, and by reason of certain minor discrepancies as to collateral facts, the Board of Special Inquiry disregarded all of the evidence which substantiated the petitioner's claims. For this reason, this court reversed the order of the lower court, denying the writ of habeas corpus. The court said:

> "The courts are powerless to interfere with conclusions of immigration authorities, and can only deal with cases where the principles of justice have been fraudulently outraged in the refusal to hear competent witnesses and competent testimony available, which is a denial of the due process of law, as we held in a recent case, refusing to permit the taking of a deposition in such cases. Youg Bark You vs. United States, 33 Federal 2nd, 236.
>
> The *mere hearing* of witnesses by an officer is of no avail to a party if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of testimony of one or a dozen such witnesses because of a fixed policy to give weight to a presumption of law far beyond the legislative intent, or because of a policy calculated to entrap the witnesses into statements inconsistent with his own or other witnesses's statements, and then to base an order of exclusion or deportation

upon such variances or discrepancies as are reasonably to be expected in all human testimony where, due to a lack of memory, to temporary forgetfulness, to lack of observation, or to inattention to questions or to a failure to fully appreciate their force and significance. When this policy is accompanied by a separate examination of witnesses without a previous knowledge of the subject of interrogation, it is certain that discrepancies will be developed as the minutia of details leave. If such unavoidable and inevitable variances are accepted arbitrarily to justify a rejection of direct testimony of witnesses, and to justify an order of exclusion, the apparent fairness of the proceedings merely gives a judicial color to obvious and premeditated injustice. *The records of the cases which have been before the courts, either in this or other Circuits, indicate a fixed policy of the Department of Labor to minutely examine and cross-examine the applicant and his witnesses, and to base an order of exclusion of the applicant upon contradictions developed between the applicant's own witnesses,* without seeking for confirmation or contradiction from other witnesses, except as their testimony is recorded in the files of the Department of Labor." (Italics ours)

This practice has become so prevalent that the immigration officials ignore all evidence and all records, and even where there are no discrepancies, pre-judge the issue by an order of exclusion of the immigrant.

The court in this case had to take one of two courses:

1. Refuse to interfere with the conclusion of the administrative officials, even though it is manifest that

all of the evidence shows that the appellant is a citizen, and that the only basis upon which the administrative officers' ruling can be predicated is the fact that they disregarded the substantial testimony showing that the applicant was a citizen, without any testimony contradictory, and merely because, as the Chairman of the Board of Special Inquiry expresses it, that "I am not satisfied that the appellant was born in the United States."

2. Interfere with and set aside the conclusion of the administrative board when it is shown that the clear, cogent and convincing proof, and the record, establish the citizenship of the appellant, and the conduct of the administrative board is manifestly unfair, in that they disregard the unimpeached testimony of the record, establishing said citizenship.

The court in the case of *Youg Bark You vs. United States, supra,* took the latter course, and said:

> "It is plain and has frequently been said that the immigration authorities are not bound by the strict rules of evidence nor determinations of proceedings. Discrepancies as to numbers of windows in the appellant's home is relevant and material to the question as to whether or not the applicant lived in the family and thus to the fact of relationship, but in the absence of conclusive evidence as to the actual fact, discrepancies are not damaging. As a basis of judging the credibility of a witness, if we have knowledge of the fact, we can weigh the value of the evidence at variance with the fact

and thus arrive at the credibility of a witness. Evidence concerning the town or village of the home is adopted to develop the question as to whether or not the applicant lived in the village and thus in the home from which he claims to come, but discrepancies here must be of the most unsatisfactory kind upon which to base a finding of the credibility of a witness, and when the cross-examiners of the Board of Special Inquiry know nothing of the actual facts concerning the village, the result is even more unsatisfactory and unconclusive.

It would seem then that the discrepancy in the testimony of a witness to justify a refusal must be on some fact logically related to the matter of relationship, and of such a nature that the error of discrepancy can not be reasonably described to ignorance or forgetfulness and must reasonably indicate a lack of veracity. The difficulty in these cases with a "discrepancy" is that there is no standard of comparison. *The immigration authorities know nothing of the actual facts, but match witness against witness* and thus develop inconsistencies, supporting one witness's testimony that the applicant is a son of an American citizen, but entirely disagreeing as to some fact concerning the village from which they claim to come. If both are shown to be wrong in some important and noteworthy feature, it might justify the rejection of the testimony of both. *But in the absence of other and affirmative evidence as to the actual fact, how can the testimony of both be rejected? Can we as a matter of common sense reject one because the other has told the truth, and then reject the other also? This seems entirely unreasonable."* (Italics ours)

I must point out that the quizzing of the immigration authorities in the case now before the court did not

throw even the slightest shadow upon the question of veracity. The fact in the present case is that the immigrant, through no fault of his, received a blank to which he was not entitled, and presumed that this was the blank for which he had made application, and so proceeded to China, and upon his return produced the form, where it developed that the same was marked upon its face "disapproved," and therefore the Board closes its ears to the record and the evidence, and denies the appellant his birthright.

PETTY DISCREPANCIES UPON WHICH THE ADMINISTRATIVE BOARD DISREGARDED THE SUBSTANTIAL UNIMPEACHED TESTIMONY:

By reference to the record of the Department of Labor, and by more particular reference to the memorandum of the Chairman of the Board of Special Inquiry for the information of the Secretary of Labor, Exhibit 7030/428, Paragraph 5, we find that great stress is laid upon the fact that the mother and father of the appellant in the year 1906 attempted to claim some fictitious children. This, however, it should be pointed out, was three years after they had already itemized their family to be but three children, and at that time the appellant was included as one of the family. Quoting:

> "It will be noted that the alleged parents claimed only two sons and one daughter when testifying in behalf of Wong Mon Fay in San Fran-

> cisco in 1903, . . . only three years later, they claimed to have seven children. . . . Wong Wing, as described in 1906, would, therefore, be 44 years old at the present time."

It should not require the citation of authorities to convince this court that the appellant should not be denied his rights as a citizen merely because his mother, after identifying him as her son in 1903, subsequently in 1906 attempted to claim certain fictitious children. To do so would be to penalize the appellant for the attempted perjury of his parents.

In the case of *U. S. ex rel. Leong Jun vs. Day, Commissioner of Immigration et al.,* 42 Federal 2nd, 714, in the New York District Court, practically the same set of facts was presented. This case is so well considered and so much in point as to justify a quotation in toto:

> "Leong Jun, a Chinese lad, 20 years of age, has been denied admission to the United States.
>
> At the hearing accorded the applicant for admission in October, 1928, the father, who was born in the United States, testified that he was married and that the applicant is his son. In 1923 when he returned from China, he testified he was not married and that he did not have a marriage name. He now states that he so testified in 1923 because he was "scared."
>
> This is the only substantial discrepancy that appears in the record of the hearings, to which the father and son were subjected separately.

(1) *The fact that the father testified falsely in* 1923 *evidence can not deprive the applicant of his right to admission as the son of an American citizen.* See ex parte Ng Ben Fong, 20 Federal 2nd, 1040.

(2) There is such a substantial agreement in the testimony of the father and son as to all things important, and many unimportant facts, that no inference adverse to the credibility of either can be drawn from the few immaterial discrepancies in their testimony, referred as to "major discrepancies" by the Board of Special Inquiry. The Board regards as major discrepancies contradictory testimony as to whether the grandparents of the appellant are buried in the same or separate graves, whether he was born in April or May, 1909, whether the school in the home village consisted of one large room or one large and two small rooms, whether land owned by the father is located 54 jungs from the home village, and whether up to February, 1923, six years ago, his parents occupied a room with their two younger children or with only the youngest child and the applicant and the other child the sleeping or sitting room.

As a major discrepancy the Board also alludes to the fact that the father of the applicant testified that his father, up to the date of his death, about 33 years ago, was in business in Chung Hong market, but that he did not know what kind of business; that he was then about 21 years old and that he never was in that market, and that a witness testified in 1923 that he saw the father regularly in the market for 10 years, and that the applicant, who was not born until after the grandfather's death, testified he never heard of the market.

This testimony the Board states, clearly shows that the father on April 9, 1923, acknowledged

that he was never married and therefore can not have a wife and four children as he claims.

There were no discrepancies, but substantial agreement as to the names and ages of the brothers of the applicant, the names and ages of their wives, and their children, the description of the village from which they came, the names and ages of the inhabitants, the name of the school teacher, the time of the day when the father left the home village for America, and the room in which he said good-bye to his family, and as to which of his sons accompanied him to the station.

Their testimony could not have been in such accord as to so many details unless the claimed relationship did exist. It seems to me that the finding that it was not established can not be maintained with any sense of fairness to the applicant. U. S. ex rel. Leon Ding v. Brough, C. C. A. 22 Federal 2nd, 926. U. S ex. rel. Fong Lung Sing vs. Day, 29 Federal 2nd, 619. The writ, therefore, must be sustained."

The same general principle has been adopted by this court in the case of *Wong Tsich Wge et al. vs. Nagle,* reported in 33 Federal 2nd, 226, Circuit Court of Appeals for the Ninth Circuit, 1929, where it adopted the language of *Go Lun vs. Nagle,* 22 Federal 2nd, 246:

"We will say at the outset that discrepancies in testimony, even as to collateral and immaterial matters, will be such as to raise a doubt as to the credibility of the witnesses and warrant exclusion; but this cannot be said of every discrepancy that may arise. We do not all observe the same things or recall them in the same way, and *an American citizen can not be excluded, or denied the right of*

> *entry, because of immaterial and unimportant discrepancies in testimony* covering a multitude of subjects. *The purpose of the hearing is to inquire into the citizenship of the applicant and not to develop discrepancies which may support an order of exclusion, regardless of the question of citizenship."* (Italics ours)

In this case the court also referred to the case of *Nagle vs. Dong Ming,* 26 Federal 2nd, 436, wherein that court said:

> "But it must be borne in mind that mere discrepancies do not necessarily discredit testimony. It is sometimes urged upon us that the testimony is impeached by discrepancies and sometimes by its complete accord. Both propositions are valid. But to be so, and to escape the charge of inconsistency, they must be understood in the light of reason upon which they rest and applied only within the language of such reason. Otherwise all testimony would be self-impeaching."

This court further referred to the case of *Maron ex rel. Le Wong You vs. Tillinghost,* C. C. A. 27 Federal 2nd, 580, quoting:

> ". . . we assume that these tribunals are not bound by the rules of evidence applicable in a jury trial. But they are bound by the rules of reason and logic—by what is commonly referred to as common sense."

Other minor discrepancies upon which the Board of Special Inquiry placed emphasis and upon which they manifestly disregarded the uncontroverted testimony, were in the testimony of the appellant and certain Chi-

nese living in Pittsburgh as to the appellant's residence there. In Exhibit 3834/14, we find the following testimony of one Yee Haim, the manager of the Quong Wah Hai Company in Pittsburgh:

"Q. I show you at this time a photograph and ask you if you can identify it? (Witness shown photograph of Wong Ying Wing contained on Inspection Card, U. S. Public Health Service, bearing Seattle No. 7030/428).

A. This picture is familiar to me as I have seen him in Pittsburgh but I cannot recall who he is.

Q. Are you positive that you saw him in Pittsburgh?

A. I saw him for about a year, 8 or 9 years ago.

Q. How long was he in Pittsburgh if you can remember?

A. I mean about 8 or 9 years ago I saw him here for about a period of two years before he left here."

In the same Exhibit, the testimony of another Chinese, Wong Yuk Sing, shows:

"Q. I show you a photograph and ask you if you can identify same? (Witness shown photograph of Wong Ying Wing contained on Inspection Card, U. S. Public Health Service, bearing Seattle No. 7030/428.)

A. I know him.

Q. What is his name?

A. I know him but I cannot tell you his name.

Q. Where did you first meet this man?

A. In this store and also around Second Ave.

Q. Do you know how long he lived in Pittsburgh?

A. No, I don't.

Q. Has he any relatives in Pittsburgh?

A. I don't know. I just know him by face.

Q. Did he have an occupation while he was in Pittsburgh?

A. He was a laundryman around Pittsburgh but I cannot tell you where."

This testimony has no material bearing upon the question of the appellant's citizenship, but is referred to merely for the reason that the Board of Special Inquiry made great point of the fact that no record of Wong Ying Wing's registry in Pittsburgh under the draft law could be found through the War Department to discredit his testimony he resided there. However, it is submitted that any errors or discrepancies in the record of the War Department should not be laid at the feet of the appellant, especially when several well known Chinese witnesses in Pittsburgh testified to the fact that Wong Ying Wing was a resident of Pittsburgh during the times he stated in his testimony. In view of the record, there can be no controversy as to the fact that the Board of Special Inquiry entirely disregarded substantial evidence, due to these petty discrepancies as to collateral

facts. The report of the Chairman of the Board itself shows that the only testimony having any bearing upon the question of the appellant's citizenship was unfairly and, due to the misconduct of the members of the Board of Special Inquiry, arbitrarily disregarded.

Referring again to the report of the Chairman of the Board for the information of the Secretary of Labor, Exhibit 7030/428, we find the following statement:

> "There is no evidence to prove that the applicant Wong Ying Wing was born in San Francisco as claimed, nor is there any evidence to establish that he is the Wong Ying Wing mentioned by the alleged parents in 1903 or the Wong Ying Wing mentioned by the same persons in 1906. It is, therefore, *not believed* that Wong Ying Wing has established his claimed birth in the United States." (Italics ours)

The case presented here is identical with the one of *Flin ex rel. Chin King v. Tillingast,* 32 Federal 2nd, 359, District Court of Mass., 1929. The Board of Special Inquiry, following its usual tactics of attempting by third degree methods to bring out minor discrepancies in the testimony of the witnesses, rather than attempting to determine the question before it of the citizenship of the applicant, entirely disregarded the only evidence having any bearing upon the question of citizenship, because of these discrepancies. The court held that the minor discrepancies were insufficient to overcome positive testimony. The court, in rendering its

opinion, criticized the practice of immigration tribunals. Quoting from this case:

> "It is not the function of the courts to reweigh evidence in these cases, but it is their duty to say whether a reasonable mind could regard direct affirmative evidence in a person's favor as offset by circumstances or mere suspicion. In this case the immigration tribunal seemed to have allowed their prejudice against the father, because of what they regarded as a previous attempt to deceive them, to blind them as to the overwhelming evidence that Wing had a son corresponding to the applicant. With this fact established, there remains only the question of whether there were reasonable grounds on which to review the evidence that the petitioner had a son. The petitioner, Wing, and the two Chinese witnesses testified directly and positively that such is the fact. Kwang's testimony, while not amounting to direct evidence of identity, certainly goes far to establish it. *Against this there is no direct evidence and there are no facts from which in my opinion such a conclusion can reasonably be reached.* It is settled that Chinese witnesses are not to be disregarded and ignored simply because of their race."

I feel that the appellant has made a most satisfactory showing, in the face of difficult conditions, and I believe the evidence fully and fairly establishes his birth in the country beyond a reasonable doubt, and I therefore respectfully move that the appeal be sustained and that the writ of habeas corpus issue.

Respectfully submitted,

EDWARD H. CHAVELLE,
Attorney for Appellant.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 7674

WONG YING WING,

Appellant,

vs.

MARIE A. PROCTOR, United States Commissioner of Immigration, at the Port of Seattle,

Appellee.

Upon Appeal from the District Court of the United States For the Western District of Washington, Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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INDEX

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant, WONG YING WING, is admittedly of the Chinese race. He claims to have been born in

San Francisco, California, November 11, 1899, and that he resided continuously in the United States until January 12, 1932. On August 5, 1930, he applied to the United States Immigration officials at Minneapolis for a citizen's return certificate, commonly known as Form 430, as authorized by Regulations of the Secretary of Labor, for the purpose of proving-up a citizenship status and facilitating his re-admission to the United States at termination of a contemplated visit to China. The said application was duly investigated and with all evidence connected therewith was forwarded to the Commissioner of Immigration, Seattle, port of intended departure and return, for approval or disapproval, as provided by the Regulations of the Department of Labor, and after a careful consideration of the same the Assistant Commissioner of Immigration, on August 21, 1930, denied and disapproved the said application on the ground that the appellant had not proved his claim of birth in this country. Triplicate copy of the application, Form 430, plainly marked "Disapproved" was returned to the Immigration Service at Minneapolis where with copy of the testimony in the case was apparently delivered to appellant's counsel in accordance with the established practice. The

appellant appealed from said unfavorable decision to the Secretary of Labor, who directed that a further examination be conducted to determine his citizenship status, which was done during December, 1930. Upon final consideration the Secretary of Labor held that the appellant had not proved his claim of birth in this country and on January 12, 1931, dismissed the appeal. Notwithstanding the action of the Secretary of Labor the appellant left the United States, returned May 29, 1934, and applied for admission to the United States as a native-born citizen thereof. After the usual hearing his application for admission was denied by a Board of Special Inquiry at the Seattle Immigration Station, from which decision he appealed to the Secretary of Labor who dismissed the appeal and directed that the appellant be returned to China. He thereafter filed a Petition for Writ of Habeas Corpus in the District Court of the United States for the Western District of Washington, Northern Division. The case now comes before this Court on appeal from the order of the District Court denying said petition.

ARGUMENT

"Exclusion" and "Deportation" are distinguished

in *ex parte Domingo Corypus*, 6 Fed. (2) 336. The appellant is an applicant for admission and is, therefore, amenable to the laws relating to "Exclusion" rather than "Deportation".

The appellant alleges in the first paragrauh, Page 5, and first paragraph, Page 12, of his brief that he is entitled to a judicial determination of his claim of American citizenship under authority of *Ng Fung Ho v. White*, 259 U.S. 276. This case is contrary to his contention. This question is definitely answered adversely to appellant in *Yoshimasa Nomura v. United States*, 297 Fed. 191, CCA9, in which the Court said:

> "The appellant makes the point that he was entitled to a judicial hearing on the question of his citizenship. But the appellant is in the position of one who is stopped at the border seeking to enter the country, and his right is determinable without a judicial hearing, or a hearing other than that which was had." Citing *United States v. Ju Toy*, 198 U.S. 253; *Tang Tun v. Edsell*, 223 U.S. 673; *Ng Fung Ho v. White*, 259 U.S. 276; *United States ex rel Bilokumsky v. Tod*, 263 U.S. 149.

The appellant cites the following cases as being in his favor, wherein the writ was sustained:

Ex parte Ng Bin Fong, 20 Fed. (2) 1014, D. C., Seattle,

United States ex rel Leong Ding v. Brough, 22 Fed. (2) 926, CCA2,

United States ex rel Fong Lung Sing v. Day, 29 Fed. (2) 619, D. C., N. Y.,

United States ex rel Leong Jun v. Day, 42 Fed. (2) 714, D. C., N. Y.

These four cases relate to foreign-born sons of alleged American citizen fathers and all were denied admission to the United States on the ground that the alleged father's previous testimony was inconsistent with the claim of relationship between the applicants and their alleged fathers, as is the issue here.

In *ex parte Ng Bin Fong, supra*, the Court rendered a decision granting the writ. On appeal to this Court, *Weedin v. Ng Bin Fong*, 24 Fed. (2) 821, the decision of the District Court was reversed and the writ denied, the Court holding that the actions of the immigration authorities in entering the exclusion order were justified by the facts and the law.

In *United States ex rel Leong Ding v. Brough, supra*, the Circuit Court of Appeals for the Second Cir-

cuit cites with approval *Ex parte Ng Bin Fong, supra,* which said decision was reversed by this Court in *Weedin v. Ng Bin Fong, supra.*

United States ex rel Fong Lung Sing v. Day, supra, and *United States ex rel Leong Jun v. Day, supra,* are decisions of the District Court at New York and both cite with approval *Ex parte Ng Bin Fong, supra,* which decision has been reversed in *Weedin v. Ng Bin Fong, supra.* The last decision has the effect of overruling the aforementioned four decisions in so far as this circuit is concerned. In addition, *United States ex rel Fong Lung Sing v. Day, supra,* was reversed, 37 Fed. (2) 36, CCA2.

The first paragraph, Page 8, of appellant's brief reads:

> "The cases lay down the uniform rule that the testimony of Chinese witnesses is not to be disregarded, and, taking into consideration other surrounding circumstances, the testimony of a Chinese person is to be given the same weight and credibility as that of any other witness. *Kwock Jan Fat v. White,* 253 U.S. 454."

We have read the decision and are unable to find anything therein upon which the quotation could be

based.

Other authorities cited by the appellant relate to discrepancies on collateral points between applicants for admission and their witnesses. The foundation of none of them are similar to the issues here and, therefore, have no application in this proceeding.

We find in appellant's brief such expressions as: "the manifest unfairness of the Board in disregarding certain substantial testimony without cause or reason", (page 4); "It was false and made for the purpose only of misleading the Secretary in arriving at a wrong conclusion." (Page 8); "However, an examination of the record of the Department of Labor will show that the immigration officials deliberately set out to decide adversely to the appellant, in spite of the testimony and the record. This practice of the immigration officials is so prevalent and well known that this Court has actually taken judicial notice of the practice." (Page 13); "This practice has become so prevalent that the immigration officials ignore all evidence and all records, and even where there are no discrepancies, pre-judge the issue by an order of exclusion of the immigrant." (Page 15); "The report of the Chairman of the Board

itself shows that the only testimony having any bearing upon the question of the appellant's citizenship was unfairly and, due to the misconduct of the members of the Board of Special Inquiry," (Page 25); "However, it is submitted that any errors or discrepancies in the record of the War Department should not be laid at the feet of the appellant," (Page 24); "The Board of Special Inquiry, following its usual tactics of attempting by third degree methods to bring out minor discrepancies * * * *." (Page 25). The appellant's petition for writ of habeas corpus does not allege misconduct on the part of any member of the Board of Special Inquiry or of any official of the Immigration Service, the Department of Labor or of the War Department, who had anything to do with this case, and no irregularity on the part of any of the said parties was alleged during the hearing on the appellant's petition in the District Court. The foregoing expressions should be disregarded as not representative of the conduct of officials of the United States Government. We may add that the mere fact that a decision of a court or tribunal may be wrong is no indication of an unfair hearing, *Yep Suey Ning v. Berkshire,* 73 Fed. (2) Page 751.

Section 23 of the Immigration Act of 1924 (8

USCA 221) places the burden of proof upon applicants for admission into the United States. All such applicants are presumed to be aliens until the contrary is proved, but the Chinese Exclusion Laws impose upon persons of the Chinese race a more positive degree of proof and this doctrine has been uniformly upheld by the courts.

Section 17 of the Act of February 5, 1917, (8 USCA 153) provides that Boards of Special Inquiry shall have authority to determine whether applicants for admission shall be allowed to land or shall be deported, and that

> " * * * * In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor: * * * *."

In *Quon Quon Poy v. Johnson*, 273 U. S. 352, the Supreme Court said:

> "and that unless it appears that the Department officers to whom Congress had entrusted the decision of his claim, had denied him an opportunity to establish his citizenship, at a fair hearing, or acted in some unlawful or improper way or abused their discretion, their finding upon the question of citizenship was conclusive and not subject to

review, and it was the duty of the court to dismiss the writ of *habeas corpus* without proceeding further."

and see

Ju Wah Son v. Nagle, 17 Fed. (2) 737, CCA9,

Chin Ching v. Nagle, 51 Fed. (2) 64, CCA9,

Fong On v. Day, 54 Fed. (2) 990, CCA2.

"It must be borne in mind that this court must not substitute its judgment for that of the immigration boards on matters of fact."

Yep Suey Ning v. Berkshire, supra.

The immigration officers are exclusive judges of weight of testimony and credibility of witnesses appearing before them.

Masamichi Ikeda v. Burnett, 68 Fed. (2) 276 CCA9.

United States ex rel Mastoras v. McCandless, 61 Fed. (2) 366 CCA3.

Testimony of persons of the Chinese race. "Testimony produced may be insufficient in quantity or quality to establish a necessary fact, but still be admissible. It may not satisfy the judicial mind, but still be admissible." *United States v. Chin Sing Quong*, 224 Fed. 752. "And, by the way of caution, we may add that jurisdiction would not be established simply by proving

that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced." *Chin Yow v. United States*, 208 U.S. 11-13. Chinese testimony is in a special class and does not stand up unless corroborated. The Chinese Exclusion Case, 130 U.S. 581; *Fong Yue Ting v. United States*, 149 U.S. 698; *Li Sing v. United States*, 180 U.S. 486. "They were not obliged to credit his uncorroborated testimony that he had received such papers and had lost them, * * *. It was no indication of unfairness that his testimony was not credited." *Wong Fat Shuen v. Nagle*, 7 Fed. (2) 611 CCA9. "It does not necessarily follow that, because four witnesses have testified positively that she was born in San Francisco, there being no witness to the contrary, their statements upon this question must be accepted as true. If such a rule were adopted and followed, there would be no more Chinese remanded in such cases." *Lee Sing Far v. United States*, 94 Fed. 837 CCA9, and see *Lew Loy v. United States*, 242 Fed. 405 CCA9.

The appellant was denied admission to the United States by a Board of Special Inquiry for the reasons

that he did not prove his claim of birth in the United States; that he was not in possession of an unexpired immigration visa; that he is an alien ineligible to citizenship not a member of any of the classes specified in Section 13 (c) of the Immigration Act of 1924. Of course, if the appellant proved himself to be a citizen of this country none of the excluding provisions would be applicable.

Throughout the Government's exhibits the alleged father of the appellant is known as Wong Heng Gee, or Wong Hong Gee, or Wong Hung Gwe, and the alleged mother's name is recorded as Lem Shee, Lum Shee or Lim Shee.

The name claimed by the appellant first became known to the Immigration Service through the application for admission of an alleged brother of appellant named Wong Moon Fay, subject of Government's Exhibit No. 24758/2-23, Wong Moon Fay is purported to have left the United States on a self-made indentification affidavit, without preinvestigation, via San Francisco November 7, 1902. He returned from China via the same port October 11, 1903, and applied for admission as a native-born citizen of the United States, and

during the course of the investigation he and his alleged parents testified in agreement that two sons and one daughter, described as:

Wong Moon Fay, 19 years, son,

Wong Ming Ying, 7 years, son, (now claimed to be the appellant)

Wong May Yu, 11 years, daughter,

were born to appellant's mother at 16 1/2 *Waverly Place,* San Franciso. The alleged mother testified that she was born in the *United States.*

Government's Exhibit 21285/2-2 contains the Immigration history of Wong Toy who is alleged to have departed without preinvestigation and returned via San Francisco September 10, 1906, and applied for admission as a native-born citizen of the United States. At the hearing he claimed the same parents as did Wong Moon Fay and stated that he was born KS 6-1-18 (February 27, 1880) at 845 *Washington Street,* San Francisco, where all his brothers and sisters were born, and had lived at said address until he was 18 years of age. His alleged parents testified in the case that all their children, 4 sons and 3 daughters, were born at 845 *Washington Street,* described as follows:

Wong Toy, 27 years, son,

Wong Fay, 25 years, son,

Wong Jung, 24 years, son,

Wong Wing, 16 years, son (said to be appellant here),

Wong Lin, 22 years, daughter,

Wong Yuk, 17 years, daughter,

Wong Ying, 20 years, daughter.

Thus, the number of children claimed born to the alleged parents of the appellant was increased by four between the dates of their testimony of October, 1903, and September, 1906, the youngest being 16 years of age. On this conflicting testimony the immigration authorities had a right to hold that the testimony of both dates was false. In this hearing the alleged mother testified that she was born in China.

The appellant testified (Page 10 of the record and at other times) that his name is Wong Ying Wing and that he was born KS 25-10-9, corresponding to November 11, 1899. Consequently, he would be less than 4 years old when his alleged parents testified in October, 1903, that they then had a son named Wong Ying, 7 years old and would be approximately 6 years and 8 months old when his alleged parents claimed in Sep-

tember, 1906, a son named Wong Wing, 16 years old. The appellant's age, based on his own statement that he was born November 11, 1899, does not agree with his age as given by his alleged parents. This age discrepancy, *per se*, disproves the appellant's claim of being a son of his alleged parents. There is also a variance in the name of the youngest son claimed by the alleged parents. In 1903 they stated their youngest son was named Wong Ming Ying and in 1906 testified that the name of their youngest son was Wong Wing, and it may be noted that in their testimony of 1906 they claimed a daughter by the name of Wong Ying.

The appellant in the first paragraph, Page 19 of his brief, admits that the alleged parents' testimony of 1906 with respect to their children is false but contends that their testimony of 1903 is correct. When the appellant admits that his alleged parents were guilty of perjury in 1906 he is in no position to brag about their integrity in 1903.

The alleged parents were given full opportunity in 1903 and 1906 to claim all the children they ever had and at neither time did they claim a son of the ap-

proximate age, or exact name, to correspond to the name and age of the appellant and it is certain that the appellant could not have been born at 16 1/2 Waverly Place and at 845 Washington Street as claimed by the alleged parents.

With a view of lessening the commercial traffic in the importation of contraband Chinese it has been consistently held through a long line of judicial decisions that Chinese are estopped from bringing children to this country who were not claimed by either parent when given the opportunity to do so. Therefore, the appellant is not entitled to admission to the United States on the ground of being a native-born citizen son of his alleged parents, and for the same reasons the admission of Wong Toy, an alleged brother, was contrary to law:

Fong Lung Sing v. Day, 37 Fed. (2) 36 CCA1,
Wong Som Yin v. Nagle, 37 Fed. (2) 893 CCA9,
Chin Lim v. Nagle, 38 Fed. (2) 474 CCA9,
Louie Foo v. Nagle, 56 Fed. (2) 775 CCA9,
Fong Kong v. Nagle, 57 Fed. (2) 138 CCA9,
Woo Suey Hong v. Tillinghast, 69 Fed. (2) 93 CCA1,
Louie Share Yen v. Nagle, 54 Fed. (2) 311 CCA9,

Soo Hoo Do Yim v. Tillinghast, 24 Fed. (2) 163 CCA1,

Ng Lin Go v. Weedin, 5 Fed. (2) 960 CCA9.

There is no record of either alleged parents of the appellant testifying before the Immigration Service since 1906. Their real identity and marital status is uncertain. THERE IS NO EVIDENCE TO SHOW THAT EITHER OF THE ALLEGED PARENTS EVER IDENTIFIED THE APPELLANT IN PERSON OR BY PHOTOGRAPH AS BEING THEIR SON.

In Government's Exhibit No. 7030/428, it is shown that the appellant testified August 5, and December 3, 1930, in an attempt to corroborate his claim of birth in this country, that when living at 513 2nd Avenue in Pittsburgh he registered as a native-born citizen under the Selective Draft Regulations, and did not claim any exemption; that he remembers a green card was issud at time of registration and later a white card was issued but did not remember that he received either card or the character of the building in which he registered. On June 12, 1934, Page 7 of the record, the appellant testified that while living at 532 2nd Avenue, Pittsburgh, he registered for the draft and

received a registration card which he lost. The War Department was requested to verify the appellant's claim of registration and under date of June 22, 1934, the War Department, speaking through E. J. Conley, Brigadier-General, advised the Immigration Service, Page 18 of the record, that no record could be found of a man named Wong Ying Wing as having registered with the Local Board for Division No. 1, Pittsburgh, which Board had jurisdiction over 532 2nd Avenue, but such a careful search was made that record was found of another Chinese bearing the same clan family name, Wong Gam Ying, 37 years of age, born January 6, 1880, residing at 513 2nd Avenue, who registered with Local Board for Division No. 1, Pittsburgh. When all the testimony of the appellant is considered with reference to his claim of registration for the draft the only conclusion that can be reached is that his claim is erroneous. The appellant may have been a resident of Pittsburgh during the Selective Draft period and if so it is no proof that he was born in the United States. If the War Department committed any irregularity in searching for record of appellant's registration the burden is on appellant to show it.

The alleged brother, Wong Mon Fay, testified in

behalf of appellant in an attempt to bolster up his claim of American citizenship. No proof has been submitted to show that Wong Mon Fay and the appellant are brothers. The citizenship of Wong Mon Fay conceded in 1903, denied in 1918, and allowed in 1919, rests on extremely doubtful evidence. As shown in Government Exhibit 24758/2-23, on April 5, 1918, Wong Mon Fay applied for a citizen's return certificate and claimed three brothers and two sisters, omitting one sister previously claimed, in partial harmony with the list of children claimed by his alleged parents in 1906. The application was denied on July 20, 1918, and again upon further consideration September 16, 1918, on the ground that his claim of birth in this country was not established. In 1919 he filed another application for a citizen's return certificate and submitted therewith an *ex parte* affidavit prepared by his counsel for the purpose of minimizing the conspiracy and reducing the degree of fraud perpertrated against the Government by himself and his alleged parents in claiming seven children in 1906. The said affidavit was made for the express purpose of increasing his chances of receiving a citizen's return certificate and for no other purpose. He admits in his affidavit that he is guilty of perjury,

fraud and conspiracy. It is self-evident that he did not recant or retract any of his criminal propensities on account of reformation, conversion to the truth or out of the goodness of his heart. Thus, he is discredited as a witness and the immigration officials were not required to believe any part of his testimony given in this proceeding. *Quan Wing Seung v. Nagle*, 41 Fed. (2) 58 CCA9; *Weedin v. Ng Bin Fong*, 24 Fed. 821 CCA9; *Ngai Kwan Ying v. Nagle*, 62 Fed. (2) 166 CCA9.

Citizen's return certificate, Form 430, *in possession of the appellant.*

The appellant in first paragraph, page 11, of his brief, attempts to justify an alleged belief that the triplicate copy of citizen's return certificate, endorsed disapproved created a right to re-enter the United States. The certificate is made an exhibit. If the appellant speaks English as well as he claims he should have understood the terms of the certificate. Exhibit 7030/428 contains the record covering the application of the appellant for a return citizen's certificate in 1930. It is shown that the application was denied by the Assistant Commissioner of Immigration at Seattle on the ground that the appellant was not shown to be a

citizen of this country. He was represented by counsel on appeal to the Secretary of Labor. The appeal was dismissed January 12, 1931. Triplicate form of the application, Form 430, marked "Disapproved" was apparently delivered to the appellant's attorney with copy of the testimony in the case for the purpose of perfecting the appeal and inadvertently got into the possession of the appellant. Appellant's attorney knew that the application was denied. Likewise the appellant knew that his application was denied for if otherwise he would not have employed an attorney to have the denial set aside. The general rule of law is that notice to the attorney is notice to the client. Appellant on his own responsibility, and without sanction or restraint of law, left the United States January 19, 1932, according to the outgoing manifest of one of the vessels of the American Mail Line. He returned to the United States on the Steamship President McKinley, arriving at Seattle May 29, 1934, presented to the Immigration authorities the aforementioned "Disapproved" copy of application for citizen's return certificate, Form 430, and applied for admission to the United States as a native-born citizen thereof. An original approved certificate, Form 430, much less a disapproved copy, is not

an adjudication of citizenship, *ex parte Chun Wing*, 18 Fed. (2) 119. The admission of Chinese is not an adjudication and the Government is not bound thereby.

White v. Chan Wy Sheung, 270 Fed. 764 CCA9;
Jo Mon Sing v. Weedin, 24 Fed. (2) 820 CCA9.

After a hearing before a Board of Special Inquiry at Seattle and the taking of testimony from the appellant's alleged brother, Wong Mon Fay, at Minneapolis, and the consideration of all evidence set forth in the exhibits it was held that the appellant had not established his claim of birth in this country and therefore denied him admission. Thereafter he appealed from said decision to the Secretary of Labor, Washington, D. C., where he was ably represented by counsel, Pages 40-46 of the record. The appeal was dismissed. The findings of the Board of Special Inquiry are shown on Pages 31-34 and of the Board of Review and Secretary on Page 47 of the record.

It is conceded that the appellant resided in the United States a number of years but how he originally entered the United States is not explained. He admits that he never attended public school in the United

States. Various courts have held that if a Chinese did not attend school during his youth it is evidence that he was not then a resident of this country.

The appellant claims in first paragraph, Page 10, of his brief that he resembles his parents and brother Wong Mon Fay. Photograph of the appellant is attached to Form 430 of July 16, 1930, in Exhibit 7030/428, and photograph of Wong Mon Fay is attached to Form 430 of March 2, 1921, in Exhibit 24758/2-23. Photographs of the alleged parents are in the same exhibit. The immigration officials did not find any special resemblance between the appellant and any of his alleged relatives. Resemblance between Chinese is commented upon by Judge Neterer in *ex parte Wong Suey Sem*, 20 Fed (2)' 148; *Wong Som Yin v. Nagle, supra.*

Since the alleged parents claimed seven children in 1906, evidently for the purpose of selling birthrights to Chinese at a later date it is only natural that the appellant is able to identify the photographs of his alleged parents and alleged brother Wong Mon Fay. However, he failed to identify the photograph of Wong Toy, a son claimed by his alleged parents and living in Minneapolis, when he testified at Minneapolis August 5,

1930, Page 7 of the testimony, Exhibit No. 7030/428 and Page 6 of the record. It is believed from consideration of the entire record that the appellant bought the birthright of a mythical child claimed by the alleged parents in 1903 and 1906 together with available family history and is now impersonating said mythical child.

Appellant says in first paragraph, Page 12 of his brief "In consideration of this issue the court should bear in mind the dicta of the Supreme Court in *Kwock Jan Fat v. White*, 253 U.S. 454, that it is better that many persons be admitted erroneously than that one United States citizen should be denied his birthright." Without admitting the authenticity of the quotation it has no greater meaning than "that it is better that many defendants be acquitted erroneously than that one innocent person be convicted." On the facts, the Kwock Jan Fat case is clearly distinguishable from the issues here involved. Of *Quon Quon Poy v. Johnson*, 273 U.S. 352; *Tang Tun v. Edsell*, 223 U.S. 673; *Chin Bak Kan v. United States*, 186 U.S. 193; *Quock Ting v. United States*, 140 U.S. 417. In the latter case the Court said:

"He may be contradicted by the facts he states as completely as by direct evidence; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying, may give rise to doubts of his sincerity.

"The question remains whether there was such a conflict of evidence that different conclusions might be reached as to the relationship of the applicant to the alleged father; for, if there was, the conclusion of the Department of Labor is final."

Soo Hoo Do Yim v. Tillinghast, 24 Fed. (2) 163 CCA1.

It is believed that the doctrine expressed by this Court in *Chin Wing v. Nagle*, 55 Fed. (2) Page 611, is amply supported by *United States ex rel Fong Lung Sing v. Day*, 37 Fed. (2) 36 CCA2, and is applicable here:

"We are not holding, however, that as a matter of fact Chin Wing is not the true son of Chin Sung. We do hold, however, that the discrepancies, especially that concerning the applicant's schooling, are sufficiently serious to preclude the determination that the applicant was not given a fair hearing by the two Boards or that the District Court committed error in sustaining the findings of these Boards. Reasonable men might easily disagree as to the probative effect of these discrepancies. While there is possibility of such disagreement among reasonable men, the findings of

> administrative boards of the kind that passed upon the appellant's case will not be disturbed." and quoting from *Tulsidas v. Collector of Customs*, 262 U.S. 258 "We think, rather, it will leave the administration of the law, where the law intends it should be left, to the attention of officers made alert to attempts at evasion of it, and instructed by experience of the fabrications which will be made to accomplish evasion."

The appellant's claim of American nativity is predicated upon being a son of his alleged parents, fortified by his alleged registration under the Selective Draft Regulations and the testimony of Wong Mon Fay. Neither of the first two allegations have been proved and due to conflicting testimony and lack of support they are not sustained by the evidence submitted. Witness Wong Moon Fay is discredited. Consequently the appellant is left without proof of his assertion that he is a native of this country. "The fabrication of testimony is always a badge of weakness in a case and when clearly established justifies a conclusion of fraud in the entire case." *Gung You v. Nagle*, 34 Fed. (2) Page 850 CCA9.

CONCLUSION

The appellant was accorded a fair hearing by the

Immigration officials and failed to sustain the burden which was upon him to establish his claim. The evidence does not constitute convincing proof that the appellant was born in the United States and is not of such a nature as to require, as a matter of law, a favorable finding in that respect. The discrepancies in the testimony constitute evidence upon which the immigration officials could reasonably arrive at their excluding decision. The said officials did not abuse their discretion committed to them by the statute, and their excluding decision is not arbitrary, capricious or in contravention of any rule of law, or in conflict with any pricinple of justice; hence, it is final. The district court did not commit error in denying the Writ of *Habeas Corpus*, and its judgment and order should be affirmed.

Respectfully submitted,

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No. 7674

In The United States
Circuit Court of Appeals
For the Ninth Circuit

WONG YING WING,

Appellant,

vs.

MARIE A. PROCTOR, United States Commissioner of Immigration, at the Port of Seattle,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

Reply Brief of Appellant

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Reply Brief of Appellant

The appellee raises the point on page 4 of her brief that the appellant in this case is not entitled to a judicial determination of his claim of American citizenship. The appellee says that the case of *Ng Fung Ho vs. White,* 259 U. S. 276, is contrary to the contention that the appellant is entitled to

a judicial determination of his claim. It further states that the question is definitely answered adversely to the appellant in *Yoshimasa Nomura vs. United States,* 297 Fed. 191, CCA9. The former case lays down the rule that Chinese claiming citizenship before immigration authorities are entitled upon a petition for a writ of habeas corpus under the Fifth Amendment, to a judicial hearing. The only limitation upon this rule is that the claim to American citizenship must be in good faith. The case goes on to explain the justice of such a rule and the theory behind it.

In all of these cases the question of citizenship itself, which is an issue to the merits of the controversy, is also a jurisdictional fact giving rise to a judicial determination. Therefore, if the court did not determine the question of citizenship it could not get jurisdiction over a case of this sort, and deportation would follow upon a purely executive order. In other words, if the courts were bound by the rulings of the administrative boards upon the question of citizenship they could never assume jurisdiction of a case involving the question of citizenship.

The case sets out a very good example of this in making an analogy to questions arising under mili-

tary law. The general rule is that persons who are not members of a military organization are not subject to martial law in peace times. Therefore, such persons have a right to appeal to the courts by a writ of habeas corpus to determine the question of whether or not they are members of a military body, rather than private citizens. Thus the question of their civil or military status is a condition precedent to their right to resort to the courts. If this question, the question of their status as civilians or members of a military body, could be conclusively determined by the military authorities, then such persons would be forever barred from the right of recourse to the courts, regardless of their status.

As to the appellee's contention that the question is definitely answered adversely in the case of *Yoshimasa Nomura vs. United States,* 297 Fed. 191, CCA9, the appellant does not believe from a reading of that case that there is any attempt to overrule the Supreme Court case which has just been referred to.

On page 11 the appellee seeks to set up the doctrine that the testimony of a Chinese citizen "is in a special class and does not stand up unless corroborated," and cites the Chinese exclusion case,

130 U. S. 581, *Fong Yue Ting vs. United States,* 149 U. S. 698, and *Li Sing vs. United States,* 180 U. S. 486. The *Li Sing vs. United States* case in no way supports this novel contention, but merely describes the statute requiring Chinese aliens applying for admission to the United States under the status of merchants to prove by two white witnesses that such has been their occupation. Thus the requirement in this case is purely statutory and based upon the policy of Congress for determining the status of Chinese aliens.

The Chinese exclusion case is in no way in point here, as in the *Li Sing* case. This case, however, is a very interesting case to read, in that it traces the history of Chinese immigration into the United States, together with a review of the treaties and legislation affecting it, up to the Chinese labor exclusion statute, which the court passed upon.

We are wholly in accord with the statement of the appellee on page 8: "We may add that the mere fact that a decision of a court or tribunal may be wrong is no indication of an unfair hearing." However, where, in this case, the facts and records show that the Board of Special Inquiry was completely diverted from the question at issue by collateral questions, we think the fact is clearly established

that appellant was denied a fair hearing. See *Damon ex rel. Wong Bok Ngun vs. Tillinghast,* 63 Fed. 2nd Series, 710. Quoting:

> "The immigration tribunals appear to have been almost completely diverted, by the collateral questions above referred to, from a consideration of the real issue on which the case turns. The way in which they dealt with it was not that fair and reasonable determination of the applicant's claim—which it is to be remembered involves American citizenship—to which he was entitled."

Respectfully submitted,

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